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May 31, 2006

Jo Lynn Traub,
Director
Water Division (Mail Code: W-15J)
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Re: Lac du Flambeau Band Treatment as a State

Dear Director Traub:

We write on behalf of the Lac du Flambeau Band of Lake Superior Chippewa Indians. In October, 2005, the Tribe applied for treatment as a state ("TAS") under the Clean Water Act ("CWA"). The Wisconsin Department of Natural Resources ("DNR") submitted its own comments to EPA, and transmitted numerous comments it received from members of the public, regarding the Tribe's application. This letter, with the attached Appendix I, responds to the DNR and public comments.

As we discuss in more detail below 1) most of the comments are not relevant to the issue of tribal authority, 2) many of the comments misperceive the scope of the Tribe's

application, and 3) the remaining two comments seek to render TAS generally unavailable under the CWA, in a manner that is fundamentally inconsistent with controlling law and longstanding EPA practice.

I. The largest group of comments has no relevance to the issue before EPA.

As EPA's regulations provide, "[c]omments [on TAS applications] shall be limited to the Tribe's assertion of authority." 40 C.F.R. § 131.8(c)(3). The largest number of comments submitted to EPA on the Tribe's TAS application are simply not relevant to this issue. Comments of this kind include (among other things) expressions that (in the commenter's view) it is unfair for Tribes to have jurisdiction over non-Indians, that non-Indians should have voting rights in the Tribe, that property values will decrease if TAS is granted, and that DNR (not the Tribe) should regulate on the Reservation.

EPA has no authority to ignore section 518(e) of the CWA in response to individuals who wish that provision had not been enacted (or that it not be applied to affect them). Instead, as EPA emphasized in the preamble to the regulations, issues of this kind "must be properly dealt with in the Courts or in Congress," and not by EPA. 56 Fed. Reg. 64,876, 64,885 (Dec. 12, 1991). At the same time, we recognize EPA's obligation to review and address all comments. For this reason, we have categorized and responded to these comments (as well as other comments not addressed in the text of this letter) in Appendix I, submitted along with this letter.[1]

II. The Tribe is seeking nothing more than what is authorized under the CWA.

The common premise of the second largest category of comments is that the Tribe is seeking to use the TAS process to address things outside the framework of the CWA, like shoreline development, regulation of motor boats, and non-point source activities such as cranberry operations. This reflects a basic misunderstanding of the scope of the Tribe's application. On behalf of the Tribe, we wish to again assure EPA and the public that in applying for TAS, the Tribe is seeking authorization only to develop water quality standards for point source discharges (as point source is defined by EPA) and to regulate wetland fills, both in a manner consistent with the CWA.[2]

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[1] The Tribe's October, 2005 submission included Attachments A through AT. Additional attachments, submitted with this letter are labeled Attachment AU through Attachment BA.

[2] DNR recognizes it has no authority regarding these two matters on the Reservation. DNR Comments at 2 (State has "no authority" regarding "point source discharges" and "wetland fills" on the Reservation). Moreover, as DNR itself explains, its overall objection to the TAS

We recognize that concerns about the scope of the Tribe's application were, to some degree, raised in response to the Tribe's inclusion in the TAS application of two versions of water quality standards – a 1999 version that applies to Tribal members, and a newer draft version that has never been implemented. TAS application, Attachment N.8. Neither version was intended to reflect any kind of determination regarding tribal water quality standards as to non-Indians, since no such standards could become final, much less be implemented, without broad public input and EPA approval. 40 C.F.R. pt. 25. The former version was included in the Tribe's TAS submission, along with several other Tribal ordinances on various topics, only to demonstrate the Tribe's experience in administering and managing programs. It was not intended as an expression of how the Tribe would proceed now in regulating Indian or non-Indian activities affecting Reservation waters if TAS status is granted.

The Tribe now recognizes that the versions of water quality standards that were submitted with the Tribe's TAS application have been the cause of some concern. As various commenters have correctly pointed out, certain provisions, particularly in the 1999 version, may address matters outside the scope of the CWA. While the Tribe certainly has authority to impose such requirements on its own members, that is different from seeking TAS under the CWA.

Whatever the source of the initial confusion, the Tribe believes it should be resolved. To clarify, the Tribe seeks TAS for purposes of sections 303 and 401 of the CWA. The Tribe's TAS application is not intended and should not be construed as seeking 1) to impose a different definition from EPA's definition on what constitutes a point source discharge, on cranberry growers or anyone else, 2) to impose any kind of general zoning restrictions or pier regulations on fee lands along the shoreline, 3) to ban motorboats from the Reservation, or 4) to take other action that is not within the authority conferred under the CWA. To the extent that anything in the Tribe's application may be viewed as potentially suggesting any other position, this letter stands as a clarification of the Tribe's application in this regard.

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application is "primarily aimed at the water quality standards authority sought by the Tribe beyond these two narrow areas [that is, point source discharges and wetland fills]." *Id.* In other words, the basis of DNR's objection here is a fundamental misperception regarding the scope of the Tribe's application. The clarification contained here removes the key cornerstone of the DNR's objection.

Finally, we emphasize that this issue demonstrates that the EPA's TAS comment process works. The Tribe's submission was evaluated by various commenters, who raised the issue of the scope of the Tribe's application. The Tribe has taken the comments seriously, and recognizes and agrees that TAS must conform to the terms of the CWA. Likewise, the Tribe is committed, if TAS is granted, to affording a full and fair process for public input on proposed water quality standards. The Tribe will consider all the comments received in the TAS process prior to proposing water quality standards. The Tribe will reach out to the public and give due consideration to all comments regarding proposed water quality standards before seeking EPA approval. The Tribe feels strongly that public input, properly directed, is an important element in the overall process.

III. The Tribe has demonstrated its authority over Reservation water resources.

The third and smallest category of comments involves legal arguments concerning the Tribe's authority over water resources. Only two sets of comments substantially address that issue, those submitted by the DNR ("DNR Comments"), and by lawyers for a group of cranberry growers, non-Indian fee landowners and others ("Kent Comments").[3] In the main, these comments rehash arguments that were rejected by the decision of the 7th Circuit in the *Mole Lake* case,[4] and plead EPA to abandon its well-established standards, as articulated in its regulations and uniformly upheld by the federal courts, for determining whether a tribe should be granted TAS status.

A. The equal footing doctrine does not undermine EPA's authority to grant TAS.

Both the DNR Comments and the Kent Comments rely on the equal footing doctrine in their arguments against granting the Tribe TAS status. DNR Comments at 4-7; Kent Comments at 29-36. Both argue that the ownership of waters by the State arising from the equal footing doctrine defeats any Lac du Flambeau claim to TAS. This argument has been expressly repudiated by the 7th Circuit in the *Mole Lake* case.

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[3] The DNR Comments are contained in a letter from Scott Hassett, Secretary of the Wisconsin DNR to Jo Lynn Traub, EPA Region 5 (Feb. 21, 2006). The Kent Comments are contained in a document entitled "Comments in Opposition to the Lac du Flambeau Application for Treatment as a State Status by Lac du Flambeau Area Lake Property Owners, et al." (Prepared by attorneys Paul G. Kent and Ron Kuehn, Feb. 10, 2006).

[4] *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001).

Mole Lake was a challenge to the EPA's granting of TAS to another Chippewa Tribe in Wisconsin. The State, in virtually the identical manner it does here, argued in *Mole Lake* that since it gained ownership of the lands underlying reservation waters upon statehood, the Tribe could not establish the authority to gain TAS approval. Relying heavily on *Wisconsin v. Baker*, 698 F.2d 1323 (7th Cir. 1983), the State contended that its title to lakebeds and riverbeds was inconsistent with Tribal authority over those waters under the CWA. The 7th Circuit squarely rejected the State's equal footing doctrine argument, including its reliance on *Baker.*

The *Mole Lake* Court found that *Baker* was not on point on three primary grounds. First, *Baker* did not involve the CWA, or any other statute "under which Congress specified that tribes would be entitled to be treated as states . . . ." *Id.* at 746. Second, *Baker* did not implicate the *Montana* test, as no argument was made in that case regarding the impact of non-Indian activities on the political integrity, economic security or health and welfare of the Tribe. *Id* at 747. Third, *Baker* did not involve water quality standards, an area as to which the "ultimate authority" to set standards is federal, not state. *Id.* In summing up its view of the equal footing doctrine and *Baker*, the 7th Circuit stated:

> *Baker* therefore has little or no application to the case before us. We find pertinent instead a number of legal principles all of which support the EPA's determination that a state's title to a lake bed does not in itself exempt the waters from all outside regulation. First, "the power of Congress to regulate commerce among the states involves the control of the navigable waters of the Unites States." *Coyle v. Smith*, 221 U.S. 559, 573, 31 S.Ct. 688, 55 L.Ed. 853 (1911). This power has not been eroded in any way by the Equal Footing Doctrine cases, which "involved only the shores of and lands beneath navigable waters. [The doctrine] cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause." *Arizona v. California*, 373 U.S. 546, 597-98, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963).

Id. (emphasis added).

While *Mole Lake* is controlling on this point, it is also significant that the Executive Branch is on record in the Supreme Court supporting the *Mole Lake* court's

analysis. As set forth in the "Brief for the Federal Respondents in Opposition" in the *Mole Lake* case, filed in May, 2002,[5] the government's position is that:

> The court of appeals correctly rejected petitioner's novel claim (Pet. 15-22) that tribal TAS status pursuant to a federal statute regulating water quality is incompatible with a State's ownership of lands underlying navigable waters pursuant to the Equal Footing Doctrine.

Brief for the Federal Respondents in Opposition to Petition for Writ of Certiorari at 14, *Wisconsin v. EPA*, 535 U.S. 1121 (No. 01-1247) As the government emphasized, the State's equal footing doctrine argument is based on a fundamentally mistaken view of the scope of federal authority over water quality standards for navigable waters:

> Congress, which indisputably has authority to empower the EPA to set water quality standards for navigable waters without regard to who owns the underlying submerged lands, directed EPA to allow qualifying Indian Tribes to make those determinations (within the parameters of the federal statutory Clean Water Act program) for all waters within the exterior boundaries of their reservations. As the court of appeals correctly observed, "[b]ecause [petitioner] does not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now complain about the federal government allowing tribes to do so." Pet. App. 9a-10a.

Id. at 15-16 (footnote omitted).

In short, the 7th Circuit's decision and the established federal position supporting that ruling (taken at a time when the issue was still potentially in play) are controlling. It is also clear that the 7th Circuit and the federal government are correct. It is well settled that all states entered the union subject to federal authority over Commerce and Indian affairs, and those powers are not diminished by the equal footing doctrine.

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[5] The federal government's Brief in Opposition is included as Attachment AU.

As the Supreme Court long ago made clear, "[t]hat the power of Congress to regulate commerce among the states involves the control of the navigable waters of the United States over which such commerce is conducted is undeniable." *Coyle v. Smith*, 221 U.S. 559, 573 (1911). It is also well settled that "'[t]he Commerce Clause confers a unique position upon the Government in connection with navigable waters,'" *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 704 (1987) (quoting *United States v. Rands*, 389 U.S. 121, 122 (1967)), and that the federal government's authority over navigable waters extends to all such waters, whether the bed is held privately, by the State, or by an Indian tribe. *Cherokee Nation* at 703-704, 704 n.3 (citing *United States v. Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592, 596 (1941).

The breadth of federal authority in Indian affairs is equally well-established. "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715-716 (1943). Indeed, "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996). The Supreme Court has also made clear that Congress' Commerce powers are not restrained by the equal footing doctrine, by a State's claim of ownership of the beds of navigable waters under that doctrine, or by a State's admission to the Union. *E.g.*, *Arizona v. California*, 373 U.S. 546, 597-600 (1963); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 (1968); *Antoine v. Washington*, 420 U.S. 194, 201-206 (1975); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-204 (1999); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 193-194 (1876).

As these cases demonstrate, whether the State owns the lands under navigable waters under the equal footing doctrine does not limit, much less nullify, Congress' powers under the Interstate and Indian Commerce Clauses. The power of Congress, before or after statehood, to regulate navigable waters, reserve waters for Indian tribes, secure rights to fish and hunt on ceded lands and waters, establish Indian reservations, and regulate Indian commerce on state lands is well-established. Congress has properly exercised this power in enacting the CWA, and as these cases establish, the lawful application of that power simply does not conflict with or implicate the equal footing doctrine.

B. Treatment as a state applies to all waters on the Reservation.

Perhaps recognizing that a direct attack under the equal footing doctrine is foreclosed by *Mole Lake*, the Kent Comments seek to invoke equal footing cases to assist in a statutory argument regarding tribal ownership of water. The Kent Comments argue that "§ 518 [of the CWA] also requires that the waters are 'held' by or on behalf of a Tribe[,]" and that this is a "live issue given the extensive case law development concerning State sovereignty over waters under the Equal Footing Doctrine." Kent Comments at 29.[6] This attempt to bootstrap the equal footing doctrine onto a statutory argument fails for two reasons. First, the equal footing doctrine does not limit federal authority over water quality standards for navigable waters, as just shown. Second, the plain meaning of the statutory language defeats this claim in any event.

Under Section 518(e)(2) of the CWA, EPA may treat a tribe as a state for water resources that are:

> held by an Indian Tribe, held in trust for Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or *otherwise within the borders of an Indian reservation* . . . . (emphasis added)

33 U.S.C. § 1377(e)(2). The language of this provision covers four categories of water, three of which are "held" by a tribe on various terms, and a fourth, which includes waters "otherwise within the borders of an Indian reservation." EPA has long construed this provision in this manner, as the preamble to the regulations makes clear:

> EPA has consistently read the phrase 'or otherwise within . . .' as a separate category of water resources and also as a modifier of the preceding three categories of water resources, thus limiting the Tribe to acquiring treatment as a State status for the four specified categories of water resources within the borders of the reservation.

56 Fed. Reg. at 64,881. Moreover, the same statutory argument made here in the Kent Comments was made by a commenter in connection with the proposed regulations, and rejected by the EPA:

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[6] The DNR Comments do not make any such argument.

> these commenters also asserted that EPA is not correct in reading the phrase 'or otherwise within the borders . . . ,' as a fourth category of water resources because to do so would render the three previous clauses superfluous. These commenters therefore conclude that section 518(e)(2) should not be read as authorizing Tribes to regulate non-Indian owned lands within the boundaries of the reservation . . . . As discussed above, EPA also does not believe that section 518(e)(2) prevents EPA from recognizing Tribal authority over non-Indian water resources located within the reservation if the Tribe can demonstrate the requisite authority over such water resources.

Id. at 64,881-64-882.

The Kent Comments argue that "[t]he Equal Footing Doctrine should be the controlling factor in determining whether the waters are 'held' by the Tribe or the State." Kent Comments at 34. But the premise of this argument – Kent's view that only waters "held" by a Tribe are covered by section 518 – is clearly refuted by the language of the statute, as confirmed by EPA's longstanding construction. There is no need for waters to be "held" by the Tribe, so long as they are within the borders of the Reservation. Accordingly, Kent's argument on this must fail.

C. The waters in question are within the borders of the Reservation.

The Tribe's application seeks TAS status with respect to waters within the borders of the Lac du Flambeau Reservation. The Kent Comments (but not the DNR Comments) argue that the Tribe can not be granted TAS because there are no waters at all "within the Reservation." Kent Comments at 19-29. In Kent's view, the 1854 Treaty[7] authorized the creation of a Reservation that includes only dry lands, but not one drop of water. *Id* at 28.

This contention fails because under section 518(e)(2), tribal authority extends to waters "within the borders of an Indian reservation." The question of title is not relevant to this determination. Instead, the issue is resolved by identifying the reservation borders. On this question, section 518(e)(2) is consistent with the statute defining Indian country,

[7] Treaty of September 30, 1854, 10 Stat. 1109.

which provides that it includes "all lands within the limits of any Indian reservation." 18 U.S.C. § 1151(a). Under both provisions, waters within the exterior boundaries of the Reservation are included within the statutory definition. This avoids the problems that would result from having jurisdictional determinations depend on title – referred to as "checkboard jurisdiction" and rejected by the Court in *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962). The exterior boundaries of the Lac du Flambeau Reservation are shown on Attachment A1, and all waters within these boundaries are within the scope of § 518(e)(2).

Kent's argument also fails because it defies not only applicable legal rulings, but common sense. A Treaty with an Indian Tribe that establishes a Reservation for the tribe can not, consistent with well-established principles, be read to silently exclude from the Reservation all waters that are within its boundaries. This would deny Indians the water needed to live. Nor would it be reasonable to find, as Kent's position would require, that the Lac du Flambeau Reservation does not include even the very Lake for which it is named – even though that Lake is entirely surrounded by Reservation lands.

The Supreme Court has repeatedly held that treaties between the United States and Indian tribes must be interpreted in accordance with rules reflecting the uneven bargaining power of the parties to those Treaties. Thus, it is "a principle deeply rooted in this Court's Indian jurisprudence[,]" that Treaties affecting Indian rights "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766); *accord Mille Lacs Band of Chippewa Indians,* 526 U.S. 194 n.5; *Washington v. Wash. State Commercial Fishing Vessel Ass'n*, 443 U.S. 658, 675-676 (1979); *Winters v. United States*, 207 U.S. 564, 576-577 (1908). Likewise, a Treaty between the United States and a Tribe is to be construed "in the sense in which they [the words of the Treaty] would naturally be understood by the Indians." *Wash. State Commercial Fishing Vessel Ass'n,* 443 U.S. at 675-676; *accord*, *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). This principle is based on the recognition that, given the vast disparity in the position of the parties, the United States had a "responsibility to avoid taking advantage of the other side." *Wash. State Commercial Fishing Vessel Ass'n*, 443 U.S. at 676.

The Supreme Court has held that tribes own and exert governmental control over natural resources on their reservations – even where the treaty, statute or executive order creating the reservation is completely silent as to those resources and simply reserves or sets aside lands. These rights include rights to hunt and fish on reservation lands and

waters, *Menominee Tribe of Indians*, 391 U.S. at 405-406, rights to use the lakes, streams and other waters of the reservation, *Winters*, 207 U.S. at 576-577; *Arizona v. California*, 373 U.S. 546, 597-598 (1963), and all minerals and timber resources on the reservation, *United States v. Shoshone Tribe of Indians of Wind River Reservation*, 304 U.S. 111, 116-117 (1938). For example, while the Treaty establishing the Menominee Reservation was silent on hunting and fishing rights, and merely stated that the tribe's lands are "to be held as Indian lands are held," that Treaty nevertheless includes the right to fish and to hunt. *Menominee Tribe of Indians*, 391 U.S. at 406 (internal quotations omitted).

In *Winters v. United States*, the Supreme Court held that in establishing the Fort Belknap Reservation in Montana, water was impliedly reserved for the Tribe. *See* 207 U.S. 564. Citing the principle of construction that "ambiguities occurring will be resolved from the standpoint of the Indians[,]" *id.* at 576, the Supreme Court determined that it could not sanction a result that would allow the United States to gain a land cession from the Tribe, while "leaving them [the Indians with] a barren waste." *Id.* at 577; *accord Arizona v. California*, 373 U.S. at 597-599. The basic principle of *Winters* and its progeny is that Reservations need water and that the establishment of a Reservation necessarily entails the availability of water for the Indians – even where Congress is silent on the question.

The Court has also held that the Treaty establishing the Reservation for the Shoshone Tribe – although silent on the subject – transferred ownership of Reservation timber and minerals to the Tribe. *See Shoshone Tribe of Indians of Wind River Reservation*, 304 U.S. 111. As the Court stated:

> In treaties made with them [the Tribes] the Unites States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They [the treaties] are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.

Id. at 116 (citations omitted).

Kent's argument that the Lac du Flambeau Reservation is completely without water flies in the face of these principles. At the time of the 1854 Treaty (as now), the life of the Chippewa centered on water. The waters were significant for subsistence

hunting and fishing, for wild rice gathering, and for a broad range of religious and ceremonial uses. *E.g. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse – Wis., Inc.*, 781 F. Supp. 1385, 1389 (W.D. Wis. 1992). *See also* Attachment B, October 12, 2005 letter from Sonosky, Chambers *et al.* to Victoria Doud at 7-15. This traditional Chippewa lifestyle could not survive without water. Yet, Kent asks EPA to ignore all this and to find that the Lac du Flambeau Band agreed in the 1854 Treaty to a land cession in return for a Reservation from which the waters necessary to maintain their most significant activities, including the means to obtain the food that they eat, would be excluded without any language to that effect appearing in the Treaty.

Kent does not argue that the Indians understood the 1854 Treaty to provide that the Reservation included no waters. Instead, in an effort to support his argument, he goes to great lengths discussing two cases – *United States v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), and *Wisconsin v. Baker*, 464 F. Supp. 1377 (W.D. Wis. 1978). But those cases turned on ownership of submerged lands, not whether Lac du Flambeau (or any other Reservation) was devoid of all water. Both of those cases involved jurisdictional questions, not Reservation boundary questions. And, both of those cases did not address the Clean Water Act or the *Montana* test. So, as the Seventh Circuit made clear, specifically addressing *Baker*, those cases have "little or no application to the [TAS] case before us." *Wisconsin v. EPA*, 266 F.3d at 747.

Nevertheless, Kent invokes *Bouchard* and *Baker* and posits that if title to submerged lands is not held by the Tribe, those submerged lands are not on the Reservation. But again, Kent's argument mixes apples and oranges. It is well settled that title and Reservation status are two different questions – and Reservations can and do include lands (and waters) that are owned by non-Indians and states. *E.g.*, 18 U.S.C. § 1151 (Indian country includes "all land within the limits of any Indian reservation . . . , notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."). For example, in *Montana v. United States*, 450 U.S. 544 (1981), the Court found that the bed of the Yellowstone River, although clearly on the Crow Reservation, was held by the State. Nevertheless, the determination of ownership of the riverbed did not dispose of the question of jurisdiction – which was separately discussed in section III of the Court's opinion. *Id.* at 557-567. As *Montana* demonstrates, these three questions – Reservation status, title to lands and jurisdiction – are separate and distinct. EPA should not be misled by Kent's attempt to obliterate these distinctions.

Kent's argument that the Lac du Flambeau Reservation has no water is also refuted by the longstanding position of the state and federal governments. The State of Wisconsin clearly does not agree with Kent. The State does not argue in its comments to

EPA that Lac du Flambeau is a Reservation with no waters. To the contrary, the premise of the State's comments is that there are waters on the Reservation, as to which, in certain respects, the State concedes it has no authority under the CWA.

> The State recognizes that there are some limited areas under the Clean Water Act where the State of Wisconsin has no authority to set water quality standards – e.g., establishing water quality standards for point source discharges on the reservation and issuing water quality certifications for wetland fills on the reservation. The State's objection [to the Lac du Flambeau TAS application] is therefore primarily aimed at the water quality standards authority sought by the Tribe beyond these two narrow areas.

DNR Comments at 2. If there were no waters on the Reservation, the State would not have indicated to EPA that the State lacks authority over point source discharges on the Reservation.

The State has acknowledged that the Reservation includes the waters within the Reservation boundaries in other ways as well. For example, the DNR entered an agreement with the Lac du Flambeau Band under which the State recognizes the Tribe's authority to issue boating and fishing licenses. Memorandum of Agreement Between the Lac du Flambeau Band of Lake Superior Chippewa Indians and the Department of Natural Resources of the State of Wisconsin, Attachment AV.[8] Among other things, the Agreement provides for a payment by DNR to the Tribe "to be used by the Tribe for fisheries management (i.e., Fish Hatchery Operations) . . . ." *Id.* at 8. The Agreement is implemented through statutes enacted by the Wisconsin legislature, including one that authorizes the issuance of fishing licenses by the Tribe, and provides that, in addition to keeping the revenues from selling those fishing licenses "the department [DNR] shall make an annual payment of $50,000 to the band for the purposes of fishery management within the reservation." Wis. Stat. § 29.2295(4m) (emphasis added). State recognition of Tribal authority to issue boat and fishing licenses and to use funds for fisheries

[8] The Agreement says "the boundaries of the reservation are described in Exhibit 'A' to the Agreement. Attachment AV at 1. The map referred to in the Agreement is the same map submitted as Attachment A.1 with the Tribe's TAS submission. This map is discussed in the following paragraph.

management only makes sense if the State acknowledges that the Lac du Flambeau Reservation includes waters.[9]

Likewise, the federal government recognizes that the Reservation includes water. The Bureau of Indian Affairs, the federal agency with the most direct responsibility for the broad course of Reservation affairs and for tribal lands and resources, maps the Lac du Flambeau Reservation as containing both lands and waters. Attachment A1. The BIA map shows the Reservation as a solid, contiguous area with a defined outer boundary – not anything like the "land only" reservation suggested by Kent.[10]

Likewise, the Bureau of Indian Affairs provides funding to the Lac du Flambeau Band every year to manage a broad range of natural resource programs. This includes funding for Water Resource Management, Fish Hatchery Operations and Maintenance, Fish Culture, Fisheries Management/Research, Habitat Improvement, and more. Attachment AW. This funding is provided under the Indian Self-Determination Act, which authorizes tribes to obtain funding and manage programs for the benefit of Indians that otherwise would be provided directly by the federal government. 25 U.S.C. § 450j-1(a)(1). Funding is provided pursuant to contracts, which specify the program obligations of the Tribe. Attachment AW. The contract for the Lac du Flambeau natural resource programs not only focuses primarily on tribal management of water related resources, it specifically refers to the waters on the Reservation. For example, the contract, to which the BIA is a party, provides that

> [b]ased on hatchery and rearing success from the lake assessment program, an estimated fourteen (14) reservation lakes will be stocked in 2005 under this contract.

Attachment AW(1) at C-3 (emphasis added).[11] As this Self-Determination contract reflects, the Tribe is the government that stocks the lakes and undertakes the broad range

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[9] The Memorandum of Agreement is not intended to "alter existing jurisdiction of any party" or to be a concession of jurisdiction by any party. Attachment AV at 8. We are relying on the Agreement not as a jurisdictional concession of any kind, but merely as evidence that the State, in its dealings with the Tribe, as a factual matter treats the Lac du Flambeau Reservation as a Reservation containing waters.

[10] *See Wisconsin v. EPA*, 266 F.3d at 746 (dicta indicating that it would be "completely reasonable" for EPA to rely on a map in finding lands to be "within the reservation.").

[11] In addition, the Tribe's Constitution, which was approved by the Secretary of the Interior, provides that

of management tasks – such as fish assessments, and creel surveys – associated with Reservation fisheries. All this reflects the BIA's recognition of the Tribe's fundamental role governing Reservation resources, including water.

EPA has also previously recognized that the Lac du Flambeau Reservation includes water – granting the Tribe TAS under section 106 of the CWA and providing funding to the Tribe to address various issues concerning Reservation waters. Attachment E.

The creation of the Lac du Flambeau Reservation underscores that this longstanding understanding – that the Reservation includes waters – is correct. The Reservation was established, as noted above, in accordance with the 1854 Treaty, which provided for a survey to be undertaken to establish the boundaries of the Reservation. The Indian Agent in charge provided the following instructions to the surveyor:

> You will consult with the Indians and as far as practicable carry out their wishes in the selection of the land [for the Lac du Flambeau Reservation]. I do not deem it necessary to do anything more than run the exterior lines, so that the Indian can understand the limits of the reservation.

Charles J. Kappler, Indian Affairs, Laws and Treaties, Vol. I (1904), Attachment AX at 1052. In connection with this survey, the Chiefs of the Lac du Flambeau Band petitioned the Indian Agent to have the surveyor select sufficient lands "to make up the full amount covered by the lakes that may come within the boundaries [of the Reservation]." *See id.* (Petition from the Lac du Flambeau Chiefs (May 26, 1863)). The text of the survey itself described the Reservation by reference to specific township and range designations – with no suggestion that waters inside the boundaries so defined would be excluded. It was then determined that the original survey did not reserve the promised amount of land to

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> The territory of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin shall be all the land and water within the confines of the Lac du Flambeau Reservation as defined pursuant to the Treaty dated September 30, 1854 . . . ."

Attachment F, Article I, Section 1 (emphasis added). This language was part of Amendment VII, approved by the Secretary of Interior on August 19, 1974.

the Indians, so additional contiguous lands were added. *Id.* at 932-933. The survey maps – an original done in 1863 and a second map adding to the Reservation in 1866 – both show a Reservation with an outer boundary with waters inside that boundary. Attachments AZ; BA.

This history reflects that 1) the government instructions to the surveyor mandated that the survey designate a Reservation with an outer boundary, 2) that outer boundary was to be established, as much as possible, to conform to the wishes of the Indians, 3) the Indians understood that there would be waters within those boundaries, and asked that the lands they receive be the full agreed-upon amount of land, without reducing that amount by virtue of the presence of waters on the Reservation, 4) the surveyor in fact surveyed a Reservation with outer boundaries, and 5) there was no indication by any party that waters within the defined boundaries would be deemed to be off-Reservation. So, from the very outset, the understanding was that the Reservation includes water.

Under Kent's formulation, the DNR, EPA and BIA have been wrong for years in recognizing that the Lac du Flambeau Reservation includes water. In Kent's view, the Lac du Flambeau Reservation is a very peculiar place – with hundreds of "off-reservation" lakes and streams that are surrounded by on-Reservation lands. This notion, that the Reservation is filled with holes like a piece of swiss cheese, undermines the intent of the 1854 Treaty to provide a viable homeland for the Chippewa, disregards the instructions to and work of the surveyor in fixing the boundaries, contravenes established legal principles regarding Treaty construction, and conflicts with the longstanding understanding and practice of the federal and state governments (as well as the Tribe) regarding the existence of Reservation waters. In short, Kent's argument that the Lac du Flambeau Reservation contains no waters is simply wrong.

D. The Tribe's TAS application meets the *Montana* test.

In our October 12, 2005 letter, *see* Attachment B, we demonstrated that the Tribe's application meets the requirements of section 518(e) of the CWA. We showed the abiding importance of water to the life of the Tribe – including subsistence activities like hunting, fishing and wild rice gathering. We further showed that activities by non-Indians on fee lands threaten to adversely impact the Tribal interest in clean water in a

manner that meets the *Montana* test. So, in accordance with EPA's regulations, the Tribe is entitled to TAS status under the CWA.[12]

The DNR Comments and the Kent Comments both contend that the *Montana* test has not been met. DNR Comments at 2-4; Kent Comments at 37-61. While their formulations differ somewhat from one another, they both argue that EPA should radically change its approach regarding the *Montana* test. In essence, DNR and Kent ask EPA to abandon its longstanding and well-reasoned approach, and to substitute an approach that would drastically narrow TAS to the point of virtual extinction. We urge EPA to maintain its current approach and to decline the invitation to eviscerate TAS.

1. EPA should not abandon its established position on the *Montana* test.

There are several reasons EPA should maintain its current approach on TAS. First, EPA is not writing on a blank slate. To the contrary, in ruling on the Tribe's TAS application, EPA is implementing its own regulations. Those regulations have been in effect for many years – and more than 30 tribes have been granted TAS under those regulations.[13] Dozens more tribes, including Lac du Flambeau, have relied on those regulations in applying for TAS. In these circumstances, basic fairness dictates that EPA not change the rules in the middle of the game by abandoning its approach to TAS. Likewise, as a straightforward matter of administrative law, EPA can not depart from its regulations regarding TAS, unless it follows appropriate procedures for modifying those regulations. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Pearce v. Dir., Office of Workers' Comp. Programs*, 647 F.2d 716, 726-727 (7th Cir. 1981) (citing cases).

Second, EPA must follow controlling court decisions on TAS. EPA's approach on TAS and water quality standards under the CWA has been uniformly upheld by the Courts. *Wisconsin v. EPA*, 266 F.3d 741; *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996). Both DNR and Kent invite EPA to ignore the court rulings, basically on the ground that they disagree with them.[14]

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[12] As the Tribe has previously argued, in our view section 518(e) is properly understood as a direct delegation of authority – as to which no separate showing should be required. Attachment B at 32-40. Our discussion here preserves that position.

[13] *See* 40 C.F.R. pt. 131 (enacted 1995); *see also* www.epa.gov/waterscience/tribes/approvtable.htm

[14] *E.g.*, DNR Comments at 7 n.1 ("The Seventh Circuit erred in *Wisconsin v. Environmental Protection Agency* . . ."); Kent Comments at 12.

But particularly with regard to the ruling in *Mole Lake*, EPA has no choice, it must comply.

Third, EPA's approach to TAS is well grounded. If Congress disagreed with EPA's TAS regulations, or the court rulings upholding EPA's application of those regulations, Congress would have said so by now. The EPA regulations defining its approach on CWA TAS have been in place for 15 years. In many places there have been public disputes about TAS, not the least of which are the three cases that went to the federal appeals courts. While Congress clearly knows how TAS has been implemented for many years by EPA, Congress has not amended the CWA to change EPA's approach.[15] This strongly supports the correctness of EPA's regulations:

> As this Court has often recognized, the construction of a statute by those charged with its administration is entitled to substantial deference . . . . Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives . . . . Unless and until Congress does so, we are reluctant to disturb a longstanding administrative policy that comports with the plain language, history, and prophylactic purpose of the Act.

United States v. Rutherford, 442 U.S. 544, 553-554 (1979) (internal citations omitted).

Fourth, and perhaps most fundamentally, at the end of the day, it is Congress that determines the contours of tribal sovereignty. This principle is discussed at some length by the Supreme Court in *U.S. v. Lara*, 541 U.S. 193 (2004). In that case, the Court upheld Congressional authority to enact a statute authorizing tribes to criminally prosecute nonmember Indians – despite the Supreme Court's prior holdings in *Duro v. Reina*, 495 U.S. 676, 693-694 (1990) that tribes lack sovereign authority to do so. In

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[15] Congress did enact a measure that prohibits Tribes in Oklahoma from gaining TAS status under the CWA under EPA's normal process. Pub. L. No. 109-59, § 10211, 119 Stat. 1144, 1937 (2005). This action by Congress reinforces that Congress is fully aware of EPA's approach on TAS, and demonstrates that, only with respect to Oklahoma (a state with many tribes, but no Indian reservations) did Congress chose to alter EPA's approach. In other words, Congress knows how to prevent EPA from granting TAS when it views it as necessary to do so, but apart from Oklahoma, Congress has not done so.

Lara, the Court emphasized the breadth of Congressional authority over Indian affairs, noting that "Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." 541 U.S. at 202. In other words, "Congress has the power to relax the restrictions imposed . . . on the tribes' inherent" authority. *Id.* at 205.

As *Lara* underscores, Court rulings limiting tribal authority do not prevent Congress from authorizing broader tribal authority. So, when Congress enacted section 518(e) of the CWA in 1987, it was free to authorize the full measure of authority for tribes that it deemed appropriate. As EPA has determined, when Congress acted in 1987, it

> expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA. This is confirmed by the text and legislative history of section 518 itself.

56 Fed. Reg. at 64,878. With this "preference" in mind, EPA requires a Tribe to make a "relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members . . . and that the waters and critical habitat are subject to protection under the Clean Water Act." *Id.* at 64,879. A tribe must also "assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe." *Id.* Once this is done, EPA will "presume that there has been an adequate showing of tribal jurisdiction of fee lands . . . ." *Id.*

EPA's regulations, then, reflect the agency's understanding of how Congress defined the contours of tribal authority in the TAS context. That definition – which includes a Congressional presumption in favor of granting TAS – has never been altered by Congress. Various Court determinations regarding tribal authority on matters other than CWA – whatever their impact in other contexts – can not change the meaning of section 518(e) as enacted by Congress. Accordingly, EPA's view today should not stray from its view when the regulations were adopted – since it is construing the same statute, which has never been amended. Under *Lara*, the question is what Congress intended when it acted, not what courts may have done to otherwise limit Tribal authority in the absence of Congressional action. With these principles in mind, we turn next to specific *Montana* arguments contained in the DNR and Kent Comments.

2. *Brendale* does not compel denial of the Tribe's TAS application.

Without considering the foregoing principles, DNR argues that EPA should abandon its regulations, and deny Lac du Flambeau's TAS application based on Supreme Court's ruling in a zoning case, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). DNR Comments at 2-4.[16] But *Brendale* was decided two years before EPA issued its TAS regulations, and EPA expressly considered *Brendale* in promulgating its rules. As EPA emphasized, *Brendale* was a highly fractured decision, in which the Court split 4-2-3. 56 Fed. Reg. at 64,877. Accordingly,

> [g]iven the lack of a majority rationale, the primary significance of *Brendale* is in its result, which was fully consistent with *Montana v. United States* . . . .

Id. Having considered the issue at length, EPA saw "no reason in light of *Brendale*," to determine that tribes could not gain TAS status over "open" areas of a Reservation (that is, areas with mixed trust and fee land ownership). *Id.* at 64,878.[17] Nevertheless, EPA took *Brendale* into account in finding that a tribe must demonstrate that the potential impacts of non-Indian activities on fee lands are "serious and substantial." *Id.*

While DNR argues that *Brendale* precludes granting TAS to any tribe that does not have a "closed" reservation, that has never been EPA's practice. To the contrary, EPA has granted TAS under the CWA to many tribes with extensive fee lands on their Reservations, including Flathead, Fort Peck (which has over 1 million acres of fee lands), and Fond du Lac. Moreover, EPA's approach has been upheld by the Ninth Circuit. *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998). That case involved TAS on the Flathead Reservation, which has "mixed ownership and control between tribal and non-tribal entities." *Id.* at 1139. As the Ninth Circuit stated, in affirming EPA's granting of TAS to the tribe on that "open" reservation:

> the agency took a cautious view by incorporating both Justice White's and Justice Steven's admonitions in *Brendale* that, to

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[16] Kent's Comments similarly address *Brendale*. Kent Comments at 39-40, 47-49.

[17] DNR, in its *Brendale* argument, states that "'[o]pen areas' are generally defined as an integrated part of the reservation not economically or culturally delimited by reservation boundaries . . . ." DNR Comments at 3. Such an amorphous definition would pose enormous implementation problems, if it had to be applied by EPA. Fortunately, that is not the case.

> support the exercise of inherent authority, the potential impact of regulated activities must been serious and substantial.

Id. at 1140-1141 (citations omitted). The *Brendale* issue has been properly addressed by both EPA and the Ninth Circuit, and there is no valid reason for revisiting that here.[18]

3. *Montana* does not require a Tribe to lack a functioning Tribal government to gain TAS.

Kent argues that the *Montana* test has been drastically curtailed apart from *Brendale*, by subsequent cases that – in Kent's view – provide that Tribal authority over non-Indians only exists if a Tribal government would otherwise be "imperiled." Kent Comments at 40-46, 49-59. Essentially, Kent contends that if a tribal government can function at all without TAS, it can not have TAS. *Id.* at 49-52. Kent's argument misconstrues section 518(e), the *Montana* test, and principles of tribal self-government.

Section 518(e) requires that a tribe seeking TAS to have "a governing body carrying out substantial governmental duties and powers." Section 518(e)(1) (codified at 33 U.S.C. § 1377(e)(1)). EPA's regulations require a tribe seeking TAS to "[d]escribe the types of governmental functions currently performed by the Tribal governing body . . . ." 40 C.F.R. § 131.8(b)(2)(ii). In other words, the law requires that a tribe be duly functioning in terms of providing governmental services to be eligible for TAS.

Kent's argument is precisely the opposite. Kent contends that if a Tribe can function without TAS, it is not eligible for TAS. As Kent states:

> The TAS application demonstrates that Lac du Flambeau are [sic] a legitimate federally recognized Indian Tribe, with an effective functioning government at the present time. Its ability to effectively operate tribal government and manage internal relations does not seem to require TAS designation. Tribal self-government has not been imperiled by lack of TAS status to date.

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[18] To the extent that *Brendale* is viewed as the controlling case, that would support a determination that section 518 of the Clean Water Act is a delegation of authority to tribes, as Justice White's plurality opinion indicates. *Brendale*, 492 U.S. at 428 (White, J.) (plurality opinion).

Kent Comments at 49-50. Kent's argument stands Section 518(e) on its head.

A Tribe which has no ability to run programs and is not functioning at all in terms of tribal self-government would not be eligible for TAS under the plain terms of the Act and the regulations. But, under Kent's view, it is only such a completely dysfunctional tribe that would be eligible. Kent suggests no reason why Congress would adopt such a counter-intuitive scheme – where only non-functioning tribes could gain TAS. Nor does Kent suggest any statutory (or regulatory) language to support his view.

Contrary to Kent's view, the *Montana* test is not about the baseline levels at which Tribal government operates in the absence of an asserted form of governmental authority. Indeed, Kent cites no case under *Montana* that even mentioned – much less one that was decided based on – factors such as whether the Tribe had income from other sources like gaming or whether the Tribe successfully operated government programs apart from the aspect of authority at issue in the case. Those considerations are simply not pertinent to a *Montana* analysis.

Kent takes language regarding "tribal self-government" found in some *Montana* cases, disregards the context of that language, and twists the meaning beyond anything supportable in the cases. The *Montana* test turns on the actual or threatened impact of non-Indian activities on tribal interests – not the question of whether the Tribe can survive without the authority. So while Kent argues for a fundamental overhaul of *Montana*, the Supreme Court continues to hold that *Montana* remains the "pathmarking case concerning tribal civil authority over non-members." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). *See also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001).

The *Montana* test has always included a component regarding tribal self-government. The second exception in *Montana* itself states that tribes have civil authority over non-Indians where their conduct "threatens or has some direct effect on the political integrity, economic security or the health or welfare of the tribe." *Montana v. U.S.*, 450 U.S. at 566. The "political integrity" prong of the second *Montana* test is sometimes referred to in terms of "protect[ing] tribal self-government." *Strate*, 520 U.S. at 459. But such language has never been held to create the bizarre formulation suggested by Kent. "Protecting tribal self-government" means protecting all elements of self-government – including the "core governmental function" of water quality management. 56 Fed. Reg. at 64,879. Kent, however, would eliminate any protection for tribal self-government for all tribes that are actually self-governing. Kent's effort to rewrite the *Montana* test in such a manner must fail.

4. The current regulatory void supports TAS.

Kent concedes that "[i]f there were no regulations currently protecting the waters within the Lac du Flambeau Reservation, [sic] there might be more merit to granting TAS status . . . ." Kent Comments at 52. Kent then presents a long discussion of the State's water quality programs. *Id* at. 52-55. But those State programs apply off the Reservation. Contrary to Kent's assumption, there currently are no federally-approved water quality standards for the Lac du Flambeau Reservation. The State lacks the authority to impose its standards on the Reservation. The State DNR expressly conceded that much in its comments to EPA on the Tribe's TAS application – stating "the State of Wisconsin has no authority to set water quality standards . . . for point source discharges on the reservation . . . ." DNR Comments at 2.[19] EPA likewise acknowledges the lack of approved water quality standards – including publicly so stating at the public information session EPA held at Lac du Flambeau on February 15, 2006.

So, Kent acknowledges that a regulatory void would support granting TAS, and such a regulatory void exists at Lac du Flambeau.

5. The impacts of non-Indian activities on the Tribe meet the *Montana* test.

The Tribe's TAS application documents a broad range of actual or threatened impacts on Reservation waters caused by non-Indian activities on fee lands. As shoreland development on fee lands increases, there is a greater risk of runoff from faulty septic systems fouling reservation waters. As more trees are cut to accommodate development, there is a greater chance of erosion and runoff threatening fish and wildlife. As cranberry operations continue to use large quantities of water, there is an increased possibility that mercury, which generally arrives from airborne sources and is deposited on Reservation lands, will be washed into Reservation waters in ever-increasing amounts – adding to the elevated mercury levels in Reservation lakes that already threaten human health. These threats – and other described in the Tribe's application – are heightened because the Tribe's reliance on water for subsistence and cultural practices (including for food) makes the Tribe particularly vulnerable to harms that impact Reservation waters.

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[19] *See also* discussion at page 2 n.2.

Kent argues that none of this matters. Kent Comments at 55-59.[20] Kent's position is that regardless of how extensive the actual or threatened impacts of non-Indian activities on Reservation waters may be, those impacts can not even be considered under a *Montana* analysis, except to the extent that the impacts are subject to regulation under the CWA. This argument misapprehends the role of the *Montana* test in the TAS context.

EPA construes section 518(e) of the CWA to require the Tribe to demonstrate its authority to regulate Reservation waters. 40 C.F.R. § 131.8(b)(3). For this purpose, EPA in turn requires an analysis under *Montana* – where the pertinent question is whether activity on non-Indian fee land "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Montana*, 450 U.S. at 566.

But the question of whether Reservation waters are threatened by activities on non-Indian fee lands is logically distinct from the question of whether the CWA expressly authorizes regulation of those activities. To a certain extent, this reflects the distinction between a right and a remedy. A tribe whose waters are threatened by non-Indian activities can meet the *Montana* test – which shows it has basic authority to regulate those waters. But the CWA places limits on the remedies available to tribes (or any other government) to address threats to water. For example, as Kent points out, non-point source pollution is not subject to regulation through water quality standards under the CWA. Kent Comments at 57-58. That does not mean, however, that non-point source pollution is not a problem,[21] or that it should not be taken into account in determining if Reservation waters are threatened under *Montana*.

EPA has recognized this distinction between the activities on fee lands that are properly part of a *Montana* analysis, and the smaller set of activities that may actually be

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[20] The studies submitted by the Tribe, which show, among other things, the presence of heavy metals in the water, are significant because they demonstrate the fact that on Reservation waters are affected by a variety of pollutants. In determining the need to create water quality standards, the Tribe must consider the impacts these pollutants have on Reservation waters regardless of whether the pollutants come from point or non-point sources.

[21] Non-point source pollution is recognized as encompassing a significant threat to waters nationwide. *See* www.epa.gov/owow/nps/facts/point1.htm ("Today, non-point source (NPS) pollution remains the Nation's largest source of water quality problems. It's the main reason that approximately 40 percent of our surveyed [waters] are not clean enough to meet basic uses such as fishing or swimming.").

regulated under the CWA. For example, in its recent decision granting CWA TAS to the Navajo Nation, EPA

> found that the Reservation's characteristics are such that various human activities occur or may occur, including septic system operation, energy production, forestry, and agriculture and livestock raising, including pesticide and herbicide use; and that those activities, if not properly regulated, can seriously affect the Tribe.

Decision Document: Approval of the Navajo Nation Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act (EPA, Jan. 20, 2006), Attachment AY at 14-15. EPA goes on to state that:

> Actual or potential impacts from those non-member activities include untreated sewage from faulty septic systems or overflowing sewage lagoon systems; excessive sediment transport from livestock overgrazing or leaking water wells; storm runoff or discharges from mining facilities, industrial facilities or construction sites, and coal slurry releases. Those impacts have the potential to seriously effect the Tribe.

Id. at 15. *See also, id.* (Findings of Fact) at 8-12. As the Navajo example demonstrates, many kinds of activities that are not subject to direct regulation as point sources under the CWA are still important for purposes of determining tribal authority under the *Montana* test.

E. Kent's constitutional arguments have no merit.

Kent includes a laundry list of constitutional issues – contending that granting TAS would be a Fifth Amendment taking, would violate the Property Clause, would unlawfully partition a state and would undermine the state's republican form of government. Kent Comments at 61-69. Kent cites no case in which a determination upholding tribal jurisdiction was held to violate any of those provisions – and there is no such case.

In essence, Kent's position is that the very existence of tribes as governments with authority over their Reservations is somehow incompatible with the Constitution. But such a proposition is fundamentally at odds with bedrock principles of federal Indian law.

From the days of Chief Justice Marshall, it has been settled law that an Indian tribe is "a distinct political society . . . capable of managing its affairs and governing itself." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). Further, Chief Justice Marshall recognized that Tribes had reservations, which were "territorial boundaries" within which Tribes exercised governmental authority. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). In short "from the earliest years of the republic, courts have recognized the political independence and self-governing status of Indian tribes." Cohen's Handbook of Federal Indian Law 207 (Nell Jessup Newton et. al ed., 2005). Hundreds of Treaties were enacted, reservations established, and court rulings were issued, based on this common understanding of the place of Indian tribes in our nation's polity.

Kent's position is that the fact of Tribal governmental authority violates constitutional protections of states. Under Kent's formulation, no Reservation could exist, and no assertion of tribal authority could be proper, consistent with the Constitution – since in every instance they would run afoul of the same Constitutional provisions Kent relies on here. The short answer is that Chief Justice Marshall disposed of that position long ago in defining the federally protecting role of tribes in our Constitutional framework. Tribes are separate self-governing entities, they do have Reservations, and nothing in that arrangement has ever been deemed unconstitutional. Kent's constitutional arguments must be rejected.

Conclusion

For the reasons set forth in its application, the attachments, and here, the Tribe's TAS application should be granted.

Respectfully submitted,

William R. Perry

William R. Perry
Douglas B. L. Endreson
Vanessa L. Ray-Hodge

Attachments

APPENDIX I

Lac du Flambeau Band's Response to Comments on its Application for Treatment as a State under the Clean Water Act
May 31, 2006

1. Comment:

Various comments contend that Reservation property values will decrease if the Tribe is granted TAS status.

Response:

These comments are outside the scope of the question currently before EPA, and are based on speculation, not facts. EPA must decide whether the Tribe has authority to regulate Reservation waters. Property values are not relevant to that issue. In any event, while it is clear from the record that there is a large tourism component to the Reservation economy, and that many people are drawn to the Reservation by clean water, there is nothing in these comments – or the record as a whole – that provides any factual substantiation for the contention that granting TAS would diminish property values.

2. Comment:

Various comments contend that it would be unfair or inappropriate for persons on the Reservation to be subject to different water quality standards than the standards that apply to persons off the Reservation.

Response:

These comments do not address the Tribe's authority over Reservation waters. Nor do these comments address TAS. Rather, they express a concern with possible differences in water quality standards between the State and the Tribe. But, any issues concerning water quality standards are at this stage premature, since the Tribe is not now seeking approval of water quality standards, and to do so, a separate process must be followed. In any event, Congress has authorized tribes to be treated as states under section 518(e) of the CWA, and EPA has no authority to deny TAS based on the possibility that Tribal and State standards may differ. To the contrary, it seems clear that Congress anticipated just such a possibility in enacting section 518(e). EPA has developed a process for resolving issues arising from differences between tribal and state (or state and state) water quality standards. 40 C.F.R. pt. 25.

3. Comment:

Various comments question tribal financial capabilities and express concern that non-Indian taxpayers will end up paying for the water quality program.

Response:

These comments are outside the scope of EPA's authority. EPA has no authority to deny TAS based on a Tribe's financial situation. In any event, these comments are conclusory in nature, with no factual support. Additionally, the comments provide no explanation of how non-Indian taxpayers could even potentially be forced to shoulder the cost of a Tribal water quality program.

4. Comment:

Various comments contend that the granting of Lac du Flambeau's TAS application will lead the Tribe to seek to expand its jurisdiction in other ways, or will encourage other Tribes to seek TAS.

Response:

These comments do not relate to the Tribe's authority over Reservation waters. The Tribe has clarified that its application seeks TAS only for purposes permitted under sections 303 and 401 of the CWA. Comments regarding other possible exercises of jurisdiction by Lac du Flambeau or any other Tribe are irrelevant, as well as speculative. In any event, exercises of jurisdiction must comply with applicable provisions of federal law.

5. Comment:

One comment suggests that EPA or DNR should check the Tribe's sewage ponds to see if they are affecting Reservation lakes.

Response:

This comment is not relevant to the Tribe's authority to regulate Reservation waters. In any event, if the Tribe is granted TAS and gains approval of water quality standards, those standards would apply with equal force to all residents, including the Tribe itself.

6. Comment:

One comment alleges close ties between EPA and the Tribe.

Response:

This comment is not relevant to the scope of the Tribe's authority. Also, this comment is vague and conclusory and provides no factual basis for its allegations. EPA and the Tribe have distinct and well-defined roles in the TAS process, and each is following its proper role.

7. Comment:

Several comments suggest that the Tribe has not properly managed its resources and might not adequately regulate reservation waters.

Response:

These comments do not address Tribal authority. In addition, no evidence was submitted to substantiate the allegation that the Tribe has improperly managed its natural resources. To the contrary, the Tribe has an established and experienced natural resources department which has successfully undertaken numerous resource management tasks, some in cooperation with EPA.

8. Comment:

Several comments suggest that the Tribe seeks TAS to promote its own interests and will use TAS unfairly against non-Indians.

Response:

These comments are outside the scope of EPA's authority since they do not address Tribal authority. Personal views of the Tribe and its relationship with non-Indians are irrelevant to EPA's determination on TAS, and the concerns expressed in these comments are mere speculation. In any event, if the Tribe is granted TAS and gains approval of water quality standards, those standards would apply with equal force to all residents, including the Tribe itself.

9. Comment:

Certain comments state that approval of TAS would negatively impact tourism and surrounding local economies.

Response:

These comments are both irrelevant and speculative. They are irrelevant because EPA must determine tribal authority, not economic impact. They are speculative because they are not supported by any facts regarding the potential economic impact of TAS. Finally, as a practical matter, granting TAS will likely have no economic impact, since TAS merely provides a Tribe with authority to proceed to develop water quality standards. The impact of water quality standards can not be assessed, in part because those standards have not yet been developed.

10. Comment:

One comment states that the Army Corps of Engineers does a good job of regulating the Reservation waters already.

Response:

This comment does not address Tribal authority. In any event, the Army Corps of Engineers does not have the authority to impose water quality standards for waters within the exterior boundaries of the Reservation. Currently, there are no federally approved water quality standards for these waters.

11. Comment:

Several comments express opposition generally to Tribal sovereignty.

Response:

These comments address issues that are not within EPA's authority. Tribal sovereignty is firmly grounded in federal law, and EPA has no power to alter such authority in response to generalized expressions of public opposition. It is well-established that Indian tribes are sovereigns under federal law. *Worcester v. Georgia*, 31 U.S. (6 pet.) 515 (1832). Congress has plenary authority to legislate with respect to the Indian tribes. *United States v. Wheeler*, 435 U.S. 313 (1978). Congress has authorized tribes to be treated like states for various purposes under the Clean Water Act, including for the purpose of

establishing water quality standards for Reservation waters. Additionally, EPA requires that tribes seeking TAS status show that they have proper legal authority. Under this test, a tribe has regulatory over non-Indians on Reservation fee lands, if the impact of the non-Indian activities on those lands threatens or has an impact on the "political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981).

12. Comment:

One comment raises questions about the Tribe's 1995 TAS application.

Response:

The Tribe's 1995 application is not at issue. The Tribe's current application was filed in October 2005.

13. Comment:

One comment contends that ownership of Reservation waters should remain private.

Response:

Ownership of the waters is irrelevant to the question of whether the Tribe has the legal authority to regulate waters within the exterior boundaries of the Reservation. *See Wisconsin v. EPA*, 266 F.3d 741, 747 (7th Cir. 2001) (upholding EPA's determination that ownership of waterbeds does not preclude tribe from regulating water quality on Reservation).

14. Comment:

One comment requested more information about the Tribe's fish harvesting program.

Response:

This comment is not relevant to the Tribe's authority. Individuals seeking information on this program should contact the Tribe directly.

15. Comment:

Several comments argue that under Wisconsin's Constitution and the public trust doctrine, waters of the Reservation belong to the state.

Response:

This is not relevant to Tribe's authority to regulate. Ownership and authority to regulate are two separate issues. *Wisconsin v. EPA*, 266 F.3d 741, 747 (7th Cir. 2001). This issue is addressed in greater detail in pages 9-16 of the letter filed with this response.

16. Comment:

Several comments contend that the Tribe's water quality standards will be too strict and will negatively impact local businesses and local economies.

Response:

These comments do not address Tribal authority. Instead, they reflect concerns about water quality standards. But the Tribe is not now seeking approval of water quality standards – so any issues dealing with such standards are premature. Prior to adopting water quality standards, the Tribe is required to seek comments from the public. The concerns expressed in these comments may be raised at that time.

17. Comment:

Many comments suggest that the Tribe is seeking to regulate matters beyond the scope of the applicable provisions of the Clean Water Act – including shoreline development, motorboating and non-point source discharges.

Response:

The Tribe has clarified that its application seeks approval of TAS status for two purposes only — to allow the Tribe to develop water quality standards for point source discharges and to address wetland fills. The Tribe's position that it is not seeking to do anything that is beyond the CWA is clearly expressed in pages 2-4 of the letter filed with this response. In any event, EPA could not, as a legal matter, approve anything beyond what is authorized by the CWA.

18. Comment:

Several comments contend that non-Indian property owners are not afforded due process in connection with TAS and water quality standards.

Response:

Seeking TAS under the CWA is a two-part process and each part provides an opportunity for public participation by non-Indians. First, the Tribe submitted its TAS application to EPA in October 2005. EPA then invited the public to submit comments, through the DNR, regarding the Tribe's legal authority to develop water quality standards. The public comment period ended on February 21, 2006. During that period, EPA also held an informational session for the public regarding this aspect of the Tribe's application. Now, the EPA must determine whether the Tribe has the legal authority to administer a water quality program. If granted, the CWA requires the Tribe to provide notice and an opportunity for the public, including non-Indians, to comment on the standards that are proposed. *See* 40 C.F.R. pt. 25. The Tribe is required to respond to the comments submitted and EPA will have final authority of the standards that are ultimately adopted.

19. Comment:

Several comments questioned the availability of remedies if jurisdictional disputes arise.

Response:

The TAS process is the mechanism for addressing issues concerning the Tribe's jurisdiction over Reservation waters. If the Tribe's TAS application is approved, the Tribe will have authority to adopt water quality standards, subject to requirements regarding public participation, and subject to EPA approval. If conflicts arise between Tribal and State water quality standards with respect to waters that are both on and off the Reservation, EPA's regulations contain a dispute resolution process. *See* 40 C.F.R. § 131.7.

20. Comment:

Several comments suggest that water quality is being properly handled by DNR or EPA.

Response:

Currently, there are no federally approved water quality standards protecting the 260 lakes, 17,800 acres of water, 72 miles of creeks, rivers and streams and 24,000 acres of wetlands on the Tribe's Reservation. Neither DNR nor EPA has water quality standards to guide the regulation of point sources of pollution within the exterior boundaries of the Reservation.

21. Comment:

Several comments contend that Tribal regulation will result in a patchwork of regulations, and that uniformity is needed.

Response:

There are currently no federally approved water quality standards applicable to the Reservation. So, if the Tribe is granted TAS, and gains approval of water quality standards, those standards will not duplicate anything now in place with respect to Reservation waters. That is, Tribal water quality standards would fill a void. To the extent that these comments suggest a "patchwork" with respect to water bodies that are both on and off the Reservation, the CWA and EPA's regulations have a specific process for dealing with any differences between water quality standards for water bodies in more than one jurisdiction. *See* 40 C.F.R. § 131.7 (dispute resolution mechanism). This is how Congress and EPA chose to address this question – both for differences between two states, and differences between a tribe and a state.

22. Comment:

Several comments suggest that the Tribe is not qualified to regulate water, based on past failures.

Response:

The Tribe has demonstrated its capability to administer a water quality program. The Tribe has a well qualified natural resources department, which, among other things, has been collecting water quality data and conducting scientific studies since 1991. The comments present no facts supporting a contrary view.

23. Comment:

Certain comments (including the Kent Comments) criticize various aspects of the water quality studies that were included as part of the Tribe's TAS application.

Response:

The Tribe included, as part of its TAS application, several studies from various sources (including EPA, the Army Corps of Engineers, the University of Wisconsin and others) regarding aspects of water quality on the Reservation. The Tribe submitted these studies in support of its *Montana* case analysis – under which the Tribe demonstrated that non-Indian activities on fee lands threaten Tribal interests in water quality.

There can be no question that non-Indian activities on fee lands significantly affect Reservation waters. Even Kent admits this much:

> We have no basis to dispute the Band's assertion that water has an historic and continuing cultural and spiritual value to its members. And there have undoubtedly been impacts to water quality over pre-settlement conditions which have affected the use and enjoyment of these resources by Tribal members.

Kent Comments at 51. But Kent nevertheless argues that the studies supporting the Tribe's application should not be relied upon because 1) they do not demonstrate that TAS is required to prevent the total demise of the Tribe, and 2) they do not prove that cranberry operations are the exclusive cause of water quality issues that exist on the Reservation. *Id.* at 49-52, 57-59. The Little Trout Lake Cooperative Association – in a set of comments signed by five cranberry operators – also makes this second argument. Neither of those arguments has merit.

First, Kent argues that the *Montana* test is virtually dead – as in Kent's view, only a Tribe facing its own demise could ever meet the test. As discussed in detail in the accompanying letter (pages 16-21), Kent is wrong on this. The Supreme Court has emphasized that the *Montana* test is alive and well – and not just for tribes that are on the verge of losing the last vestiges of their right to self-government. EPA has continually recognized the vitality of the *Montana* test in its decisions in TAS matters, and EPA's approach on this fully comports with the law. The technical water quality studies relied on by the Tribe need not show that the Tribe is unable to function as a Tribe without TAS.

Second, the Little Trout Lake Cooperative Association and Kent seek to challenge certain aspects of some of the studies submitted by the Tribe. Kent Comments, Exhibit 17. Their basic thrust in this regard is that the studies submitted by the Tribe do not prove that cranberry operations are solely to blame for water quality problems on the Reservation.

But this critique misses the point of the Tribe's submission in this regard. The Tribe included a range of studies with its application to demonstrate that Tribal waters are threatened by non-Indian activities under *Montana*. It is simply no answer to address elevated levels of pollutants or changes in sedimentation or water chemistry in Reservation waters by arguing that it can not be shown that these are caused only by cranberry operators. The question is whether activities or fee lands are harming or threatening Tribal interests – not whether one category of activity is solely responsible.

For example, the Tribe included with its submission a 2000 University of Wisconsin study regarding Little Trout Lake, Inkspot Bay, Great Corn and Little Corn Lakes. Winkler & Sanford, Environmental Changes in the Last Century in Little Trout Lake, Inkspot Bay and Great Corn and Little Corn Lakes, Lac du Flambeau Tribal Lands, Wisconsin (U. of Wis., 2000), Attachment K2. That study found, for example, that since 1945 "sedimentation rates have increased dramatically in Inkspot Bay." *Id.* at 2. The response to this in the comments is basically that the change in sedimentation may be partially attributable to things other than cranberry operations. Both Kent and the Little Trout Lake Cooperative Association attached with their comments a letter from Teryl Roper (also from the University of Wisconsin) which stated, with respect to the Winkler and Sanford study:

> The sedimentation rate data may well be accurate, but I think it would be a mistake to blame the increased rate of sedimentation entirely on cranberries. Some of that increased rate is due to cranberries, particularly if erosion occurred during bed construction.

Letter from Teryl R. Roper to Mike Bartling at 2 (Apr. 4, 2000). In other words, rather than denying the Winkler and Sanford finding of increased sedimentation, Roper merely contends that it may be the result of multiple factors (including cranberry operations).

Likewise, the Winkler and Sanford study found "increased nutrients and increased toxic elements in both bodies of water [Inkspot Bay and Little Trout Lake]. Arsenic and

lead concentrations are highest in the last five decades. Elevated mercury levels are of greatest concern." Attachment K2 at 9. In response, Roper states:

> The data are hardly *prima facie* evidence that the reported changes in the lakes are due to cranberry cultivation. Alternative sources of the heavy metals, nutrients, etc. are identifiable.

Letter from Teryl R. Roper to Tom Lochner (Aug. 7, 2001). Here, again Roper's point is not that toxic metals are not present in the waters, but instead that those toxic metals may come from various sources other than cranberry operations.

As these exchanges indicate, the criticism of the Tribe's water quality studies misses the mark. The Tribe's point is not that not all water quality problems in these water sources are attributable to cranberry operations. Rather, the studies submitted by the Tribe underscore that the Reservation waters – which are vital to the Tribe's subsistence way of life as well as the local recreation based economy – are threatened by changes involving concentrations of metals, alkalinity, sedimentation and other measures. Whether these threats arise from one activity or many, they provide the basis for meeting the *Montana* test.

In short, the studies submitted by the Tribe, along with other elements of the record as a whole, support the Tribe's assertion that impacts from non-Indians on fee lands threaten the political integrity, economic security or health and welfare of the Tribe.

24. Comment:

Certain comments express concern that the Tribe, in the development of its water quality standards, will invoke "spiritual values" which are not an appropriate consideration.

Response:

As part of its application, the Tribe is required to show that "there are waters within the reservation used by the Tribe or tribal members, . . . and that the waters and critical habitat are subject to protection under the Clean Water Act." 56 Fed. Reg. 64,876, 64,879 (Dec. 12, 1991). The Tribe's use of the waters for spiritual and religious ceremonies is relevant to this factual inquiry. *See City of Albuquerque v. Browner*, 97 F.3d 415, 427-429 (10th Cir. 1996) (upholding tribe's inclusion of ceremonial use designation in water quality standards under the Clean Water Act).

25. Comment:

Several comments oppose the application on the ground that the Tribe has not provided sufficient information on its water quality standards.

Response:

These comments are premature, since the Tribe is seeking TAS. The Tribe's current application does not seek approval of any water quality standards. Only if the EPA grants the Tribe's application can it develop water quality standards.

26. Comment:

Several comments sought more information or more time for the TAS process.

Response:

The Tribe submitted its application in October 2005. EPA sent out a public news release shortly thereafter and published the Tribe's application on its website. The Tribe's complete application was also made available for review at the Tribe's Natural Resource Department and at the Minocqua Public Library. EPA held an information session at Lac du Flambeau on February 15, 2006 to provide information to individuals regarding the Tribe's application. In addition, the public was invited to provide written comments and the EPA extended this deadline from January 20 to February 21, 2006 to provide more time for the public to comment. EPA's process has been more than adequate.

27. Comment:

Several comments ask whether the Tribe is required to comply with certain scientific standards in promulgating water quality standards.

Response:

These comments address water quality standards, not TAS. In developing its water quality standards, the Tribe is bound to follow the scientific criteria for water quality contained in the Clean Water Act. 40 C.F.R. § 131.11(a)(1).

28. Comment:

Several comments ask about Tribal enforcement.

Response:

The Tribe's application for TAS seeks authority for the Tribe to set water quality standards. If Tribal water quality standards are approved, EPA will be in charge of permitting and enforcement.

29. Comment:

Certain comments question the need for granting TAS status to the Tribe.

Response:

There are no federally approved water quality standards for the Reservation. The Tribe wants to fill this void and provide standards that protect all Reservation residents and visitors. Water is the foundation of the Tribe's culture and the modern economy of the Reservation. Many Tribal members exercise Treaty rights on the Reservation to hunt, fish and gather wild rice in the traditional manner. Tribal religious ceremonies focus on water. Even the name of the Reservation – Lake of the Torches – reflects the importance of water. These traditional uses co-exist with a recreational and tourism industry – as increasingly the Northwoods location is a destination for those who live in urban areas. All this depends on clean water.

30. Comment:

A few comments question the Tribe's ability to respond to hazardous waste spills if TAS is granted.

Response:

The problems of hazardous waste spills is a significant one nationwide. Nevertheless, that issue is not within the scope of the CWA TAS process. Spill response and cleanup oversight of hazardous substances is covered under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The CWA can be implicated only in the case of oil spills in navigable water that violate applicable water quality standards. In any event, EPA is responsible of hazardous waste spills and the Tribe's CWA TAS application will not affect that.

31. Comment:

Certain comments ask for information about the process for modifying water quality standards in the future.

Response:

If granted TAS, and if its water quality standards are approved by EPA, the Tribe would have the authority to modify its water quality standards in the future. However, the CWA requires that when the Tribe proposes to do so, it must provide notice and give the public an opportunity to comment on the proposed changes. *See* 40 C.F.R. §§131.20; 131.21.

32. Comment:

Certain comments ask whether EPA can approve the Tribe's TAS application without state approval.

Response:

Approval of the State is not required for the EPA to approve the Tribe's application.

33. Comment:

Certain comments ask whether approval of the Tribe's TAS application will create jurisdictional conflicts.

Response:

Granting TAS consistent with the CWA can provide clarity regarding regulatory authority over Reservation waters. While sometimes granting TAS has led to disputes and litigation, in most instances TAS ultimately leads to a positive relationship among affected parties.

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Brief for the Federal Respondents in Opposition to Petition for Writ of Certiorari, *Wisconsin v. EPA*, 535 U.S. 1121 (2002) (No. 01-1247)

No. 01-1247

In the Supreme Court of the United States

STATE OF WISCONSIN, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Sokaogon Chippewa Community of the Mole Lake Band of Chippewa Indians may administer a water quality standards program for surface waters within its reservation pursuant to Section 1377(e) of the Clean Water Act, 33 U.S.C. 1377(e), notwithstanding Wisconsin's claim that it holds title to the beds of some of those waters under the Equal Footing Doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 266 F.3d 741. The opinion of the district court (Pet. App. 15a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2001. A petition for rehearing was denied on November 28, 2001 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on February 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Congress has authorized the Environmental Protection Agency (EPA) to treat Indian Tribes in the same manner as States for certain purposes of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and has directed EPA to promulgate regulations "which specify how Indian tribes shall be treated as States" for those purposes. 33 U.S.C. 1377(e). See Pet. App. 86a-87a. Following notice and comment, EPA promulgated regulations that provide a mechanism for Tribes to receive "treatment as a state" (TAS) status. See 40 C.F.R. 131.8 (Pet. App. 89a-92a). The Sokaogon Chippewa Community of the Mole Lake Band of Chippewa Indians (the Band) applied for and received TAS status under those regulations. *Id.* at 37a-38a. Petitioner, the State of Wisconsin, brought this action in the United States District Court for the Eastern District of Wisconsin challenging EPA's grant of TAS status to the Band as unlawful. The district court rejected petitioner's assertions that EPA's decision is invalid as a matter of law, *id.* at 15a-34a, and the court of appeals affirmed, *id.* at 1a-14a.

1. The CWA is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. 1251(a). To achieve those goals, the CWA establishes a partnership between the federal government and the States in which the States have "primary responsibilities and rights" to regulate water pollution. 33 U.S.C. 1251(b); see 33 U.S.C. 1370; *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). Congress has also extended that partnership to Indian Tribes by providing, through Section

1377(e) of the CWA, that Indian Tribes satisfying prescribed criteria are eligible for treatment in the same manner as States for certain purposes under the CWA. See 33 U.S.C. 1377(e).

As part of its regulatory program, the CWA provides that each State must adopt water quality standards for all waters within the State's jurisdiction and submit those standards to EPA for approval. 33 U.S.C. 1313(c). States must specify one or more designated "uses" of each waterway (*e.g.*, public water supply, recreation, fish propagation, or agriculture) and must establish water quality criteria to protect those uses. 33 U.S.C. 1313(c)(2)(A). EPA reviews all new or revised state water quality standards for consistency with the requirements of the Act. 33 U.S.C. 1313(c)(3). If EPA determines that a state standard does not meet minimum federal requirements, then EPA disapproves the standard. The State may then adopt changes suggested by EPA, or failing such action, EPA must itself issue a water quality standard for the State. 33 U.S.C. 1313(c)(3) and (4)(A).[1]

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[1] In addition to water-quality-based requirements, the CWA also provides for technology-based requirements, which take into account the capability of existing pollution-control technologies to remove particular pollutants from effluents. EPA or the State may establish effluent limitations, reflecting technology-based requirements for discrete categories and classes of point sources, that restrict the quantities, rates, and concentrations of specified pollutants that may be discharged into water from the point sources. See 33 U.S.C. 1311, 1342. Both water quality-based and technology-based requirements are implemented for point sources through a permit process, known as the National Pollutant Discharge Elimination System (NPDES). The Act prohibits "the discharge of any pollutant" into the Nation's waters except as authorized by an NPDES permit. 33 U.S.C. 1311, 1342; see *EPA* v. *California*, 426 U.S. 200, 205 (1976). All NPDES permits must

Federal law generally prohibits States from exercising regulatory authority within Indian reservations unless Congress has authorized such action. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 & n.18 (1987); see also *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."). As originally enacted, the CWA did not specifically identify any non-federal governmental entity that had authority to set standards for waters within Indian reservations. Congress amended the CWA in 1987 to provide that EPA may treat qualifying Indian Tribes in the same manner as States for the purposes of, inter alia, setting water quality standards for surface waters within the exterior boundaries of their reservations. 33 U.S.C. 1377(e); see Water Quality Act of 1987, Pub. L. No. 100-4, § 506, 101 Stat. 76. Section 1377(e) states that EPA is authorized to "treat an Indian tribe as a State" for the purposes of 33 U.S.C. 1313 if:

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe,

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include effluent limitations that require the permittee's adherence to technology-based standards and, where applicable, more stringent water quality-based limitations designed to ensure that the receiving waters attain and maintain state water quality standards. See 33 U.S.C. 1342(a)(1); 40 C.F.R. 122.4(d); *Arkansas*, 503 U.S. at 104-107.

> held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. 1377(e). The term "Federal Indian reservation" is defined for those purposes to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. 1377(h)(1); cf. 18 U.S.C. 1151(a). Section 1377(e) directs EPA to promulgate regulations "which specify how Indian tribes shall be treated as States for purposes of this chapter" and to provide a mechanism for resolving disputes between States and Indian Tribes located on common bodies of water. 33 U.S.C. 1377(e).

2. In accordance with Section 1377(e)'s directions, EPA has promulgated regulations for the treatment of Indian Tribes in the same manner as States. See 40 C.F.R. 131.8 (Pet. App. 89a-92a). EPA's regulations set out four criteria, embodying the statutory requirements of Section 1377, that an applicant must meet to receive TAS status. See 40 C.F.R. 131.8(a); Pet. App. 89a.

First, the applicant must be a federally recognized Indian Tribe that exercises governmental authority over a federal Indian reservation. 40 C.F.R. 131.8(a)(1),

131.3(k) and (*l*); see 33 U.S.C. 1377(e)(1) and (h). Second, the Indian Tribe must have a governing body that carries out "substantial governmental duties and powers." 40 C.F.R. 131.8(a)(2); see 33 U.S.C. 1377(e)(1). Third, the water quality standards program that the Indian Tribe seeks to administer must pertain to the management and protection of water resources that are within the borders of the Indian reservation. 40 C.F.R. 131.8(a)(3); see 33 U.S.C. 1377(e)(2). Fourth, the Indian Tribe must reasonably be expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and the relevant regulations. 40 C.F.R. 131.8(a)(4); see 33 U.S.C. 1377(e)(3).

EPA's regulations also set out the procedural requirements that Indian Tribes must follow to apply for and obtain TAS status. 40 C.F.R. 131.8(b) and (c); Pet. App. 89a-92a. The Tribe must submit a detailed application to the appropriate EPA Regional Administrator demonstrating that the Tribe satisfies the prescribed criteria for TAS status. 40 C.F.R. 131.8(b). The Regional Administrator provides notice of a Tribe's application to all appropriate governmental entities and allows 30 days for the submission of comments on the Tribe's assertion of authority. 40 C.F.R. 131.8(c)(2)(ii) and (c)(3). The Regional Administrator then determines, based on the Tribe's application, comments received, and other relevant information, whether the Tribe "has adequately demonstrated that it meets the requirements" for treatment in the same manner as a State. 40 C.F.R. 131.8(c)(4).

Section 1377(e)(2) allows Tribes to implement portions of the CWA when "the functions to be exercised by the Indian Tribe pertain to the management and

protection of water resources * * * within the borders of an Indian reservation." 33 U.S.C. 1377(e)(2). EPA has made a judgment to look to this Court's precedents respecting inherent tribal authority for guidance on how to implement the statutory TAS program and to address non-Indian interests, including the interests of non-Indians who own fee lands within a reservation. EPA observed, in the preamble to its regulations, 56 Fed. Reg. 64,876 (1991), that an Indian Tribe may have "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Pet. App. 95a (quoting *Montana* v. *United States*, 450 U.S. 544, 566 (1981)). EPA therefore decided that, in implementing Section 1377(e) in situations where non-members would be affected, the agency would take account of the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Pet. App. 96a.

Rather than establishing a bright-line rule, EPA stated that "the ultimate decision regarding Tribal authority [over non-members] must be made on a Tribe-by-Tribe basis," Pet. App. 95a, and the "extent of such tribal authority depends on the effect of th[e] activity on the tribe," *id.* at 96a. EPA determined that it would proceed on the premise (which EPA termed an "interim operating rule") that the Tribe should be required to show in all cases that the "potential impacts of regulated activities on the tribe are serious and substantial." *Id.* at 97a. But EPA also observed that "the activities regulated under the various environmental statutes generally have serious and substantial impacts

on human health and welfare." *Ibid.* It ultimately concluded that "[t]he determination as to whether the required effect is present in a particular case depends on the circumstances." *Ibid.*

3. The Band applied to EPA for TAS status for the purpose of developing water quality standards for all surface waters within the boundaries of the Mole Lake Reservation (the Reservation) in northeastern Wisconsin. Pet. App. 50a. Although a Tribe may also seek authorization to administer an NPDES permit program within its reservation, see note 1, *supra*, the Band did not request that additional authority. In accordance with EPA's regulations, petitioner was provided with an opportunity to comment on the Band's application. Petitioner disputed the Band's authority to set water quality standards within the Reservation on the basis of petitioner's claim that it held title to the beds of the lakes within the Reservation. *Id.* at 69a. EPA considered the materials submitted by both the Band and petitioner. It determined that the waters in question are within the Reservation, *id.* at 52a, and that the Band has authority under EPA's regulations to develop water quality standards for all surface waters within the Reservation's boundaries, *id.* at 39a-47a, 52a-53a.

4. Petitioner filed suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, challenging EPA's decision to grant the Band TAS status to establish water quality standards under the CWA. Pet. App. 22a. Petitioner claimed that it held title to the beds of navigable lakes within the Reservation under the Equal Footing Doctrine and that the Band, therefore, could not set water quality standards for those waters. *Id.* at 21a. The district court granted summary judgment for EPA and the Band, concluding that EPA's decision is reasonable and consistent with

the CWA and EPA's implementing regulations. *Id.* at 32a.

5. A unanimous court of appeals panel affirmed. Pet. App. 1a-14a. The court noted at the outset that two factors are highly pertinent to the Tribe's interest in assuming responsibility for water quality standards within the Reservation: "First, the Band is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines, and raw materials. * * * Second, all of the 1,850 acres within the reservation are held in trust by the United States for the tribe." *Id.* at 4a-5a.

Like the district court, the court of appeals rejected petitioner's argument that, because it claimed to hold title to the beds of navigable lakes under the Equal Footing Doctrine, the Band is not entitled to specify water quality standards for those lakes. Pet. App. 7a-10a. The court of appeals reasoned that, assuming arguendo that petitioner does have title to the lake beds, *id.* at 7a-8a, the Tribe's issuance of water quality standards for the lakes is consistent with petitioner's ownership of the land beneath the water, *id.* at 8a-10a.

The court of appeals acknowledged that the Band's establishment of water quality standards for surface waters within its Reservation could conceivably affect activities outside of the Reservation. Pet. App. 10a.[2] The court noted, however, that Congress had provided for that possibility by directing EPA to create "a

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[2] Most significantly, NPDES permits issued to a discharger in an upstream State may need to include limitations if necessary to meet the applicable downstream water quality standards. *Arkansas* v. *Oklahoma*, 503 U.S. at 107; see *Wisconsin* v. *EPA*, No. 96-C-597 (E.D. Wis. filed May 21, 1996); Pet. App. 11a (citing *City of Albuquerque* v. *Browner*, 97 F.3d 415 (10th Cir. 1996), cert. denied, 522 U.S. 965 (1997).

mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water" (33 U.S.C. 1377(e)). Pet. App. 10-13a. The court noted that, in any event, petitioner "exaggerates" the possibility of such speculative conflicts. See *id.* at 13a. The court of appeals concluded that EPA's grant to the Band of authority to issue water quality standards for surface waters fully within the Reservation's boundaries is reasonable on the facts of this case and not otherwise contrary to law. *Id.* at 14a.

ARGUMENT

The court of appeals correctly concluded that EPA acted within its authority under 33 U.S.C. 1377(e) of the Clean Water Act in authorizing the Mole Lake Band to set water quality standards for surface waters wholly within its reservation and wholly surrounded by tribal lands. That fact-specific decision does not conflict with any decision of this Court or any other court of appeals, and it does not raise any issue of exceptional importance warranting this Court's review.

1. This Court normally does not review a court of appeals' decision affirming a federal agency's application of a federal statute to particular factual circumstances in the absence of a square conflict among the courts of appeals on the meaning of the statute. Petitioner does not contend that this case presents such a conflict. To the contrary, the two other courts of appeals that have considered EPA grants of TAS status to Tribes to set water quality standards for their reservations have similarly sustained EPA's exercise of its authority under Section 1377(e).

In *City of Albuquerque* v. *Browner*, 97 F.3d 415, 419, 425-426 (1996), cert. denied, 522 U.S. 965 (1997), the Tenth Circuit upheld EPA's regulations and its approval of the Pueblo of Isleta's water quality standards. The court ruled that EPA had properly incorporated those standards into an NPDES permit issued to the City's waste treatment facility, which discharged into the Rio Grande at a point above the reservation. See *id.* at 425-426. The court concluded that EPA's authorization of the Pueblo to establish water quality standards for purposes of the CWA "is in accord with powers inherent in Indian tribal sovereignty." *Id.* at 423.

In *Montana* v. *EPA*, 137 F.3d 1135, cert. denied, 525 U.S. 921 (1998), the Ninth Circuit upheld EPA's grant of TAS status to the Confederated Salish and Kootenai Tribes to establish water quality standards throughout the Flathead Reservation. The court "affirm[ed] the district court's decision that EPA's regulations pursuant to which the Tribe's TAS authority was granted are valid as reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members." *Id.* at 1141.

The court of appeals' decision in this case is consistent with *Albuquerque* and *Montana*. Like the Ninth and Tenth Circuits, the court of appeals concluded that EPA acted within its authority and discretion by granting TAS status to a particular Indian Tribe based on a "fact-specific" analysis of the factors identified in Section 1377 of the CWA and EPA's implementing regulations. Pet. App. 14a. Because the three courts of appeals that have addressed EPA's application of Section 1377(e) have spoken harmoniously, there is no occasion for this Court to intercede.

As in *Albuquerque* and *Montana*, this Court should deny the petition for writ of certiorari.[3]

2. Petitioner asserts (Pet. 11-15) that, notwithstanding the absence of a conflict among the courts of appeals, the issues raised in this case are of exceptional importance warranting this Court's review. Petitioner specifically contends (Pet. 14-15):

> Unless EPA's policy is corrected, large numbers of nonmembers of [Indian tribes] in this country may find, to their considerable surprise, that they have become subject, either directly or indirectly, to the authority of tribal governments in which they have no rights to participate and which may provide limited opportunity for fair review of adverse tribal decisions. This is particularly true on reservations, like some in Wisconsin, populated by large numbers of nonmembers.

Petitioner further asserts (Pet. 15) that the instant case provides "a good vehicle for addressing the limits of tribal sovereignty over nontribal resources and persons."

Petitioner is mistaken as to the practical effect of this decision and its suitability as a "vehicle" for addressing the issues that petitioner contends are "fundamentally important" (Pet. 15). This case involves a fact-specific

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[3] Petitioner mistakenly suggests (Pet. 13) that in this case, unlike *Montana*, the court of appeals deferred "to EPA's legal analysis of Indian law precedent." Rather, the court of appeals stated that EPA's "regulations and subsequent decision" were entitled to deference. Pet. App. 6a. The court of appeals did not defer to EPA's interpretation of case law, nor did the government suggest that the court should do so. See Gov't C.A. Br. 14 n.8 ("EPA, of course, agrees with Wisconsin (Br. 15) that the Agency's interpretation of case law is reviewed by this Court *de novo*.").

application of Section 1377(e) to one relatively small Indian reservation. Moreover, as the court of appeals' decision points out, the Mole Lake Reservation is "unusual" in that "[n]one of the land within the reservation is controlled or owned in fee by non-members of the tribe." Pet. App. 4a-5a. Unlike *Montana* v. *EPA*, in which the Court denied review, the issue of tribal regulation of nonmembers living within the boundaries of an Indian reservation is wholly absent from this case. Furthermore, it is currently unclear what, if any, effects the Band's water quality standards will have on activities outside the Reservation. See *id.* at 13a ("granting TAS status to tribes simply allows the tribes some say regarding [water quality] standards and permits"). Hence, this case is a particularly poor vehicle for assessment by this Court of the effects of a Tribe's TAS status on non-Indians.[4]

Petitioner's suggestion (Pet. 12-13) that this decision will inevitably lead to tribal regulation of waterways throughout Wisconsin vastly exaggerates the impact of this case. The Band's reservation encompasses a mere 1850 acres, all of which are held by the United States in trust for the Band. EPA granted TAS status based on an individualized assessment of the Band's circumstances, Pet. App. 37a-47a, in accordance with the agency's view that "the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis," *id.* at 95a. As the court of appeals correctly

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[4] Petitioner has filed a separate suit specifically challenging the Band's water quality standards, which would be more likely to encounter such questions. See *Wisconsin* v. *EPA*, No. 96-C-597 (E.D. Wis. filed May 21, 1996). On June 17, 1999, the district court administratively closed that case, subject to reopening within 90 days after the outcome of the appeal in this case. See *id.*, Docket Sheet Entry No. 26 (June 18, 1999).

observed (*id.* at 14a), EPA's grant of TAS status to the Mole Lake Band is justified by the Band's substantial reliance on the Reservation's water resources and the complete absence of "fee land within the reservation owned by non-members of the tribe." Because EPA's determination here was "fact specific," the court of appeals left for "another day" how far a tribe's authority might extend "on a different set of facts." *Ibid.* The court of appeals' explicitly limited rationale and the record here therefore contradict petitioner's claim (Pet. 12) that "[i]f the decision below is allowed to stand, Wisconsin will lose much of [its] authority with respect to hundreds of navigable waterways."[5]

3. The court of appeals correctly rejected petitioner's novel claim (Pet. 15-22) that tribal TAS status pursuant to a federal statute regulating water quality is incompatible with a State's ownership of lands underlying navigable waters pursuant to the Equal Footing Doctrine. Like EPA and the district court, the court of appeals assumed, arguendo, that petitioner owns lands underlying some of the surface waters within the Reservation, but it nevertheless decided that such

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[5] Petitioner also overstates the national significance of the TAS program. Petitioner contends (Pet. 13) that "over 210 tribes nation-wide have received TAS status *under various provisions* of the Clean Water and Safe Drinking Water Acts" (emphasis added). This case, however, involves TAS status to establish water quality standards, and not TAS status for other programs. EPA informs us that, out of a total of 49 applications for TAS authority to establish water quality standards over the past decade, EPA has approved 23. As noted above, those approvals have generated only three court of appeals decisions since the issuance of EPA's regulations in 1991.

ownership would not affect the Tribe's qualifications for TAS status. Pet. App. 7a-10a.[6]

As the court of appeals recognized, petitioner's reliance on its asserted title is misplaced because Congress did not condition a Tribe's entitlement to TAS status on that criterion. Pet. App. 8a-10a. Congress, which "has plenary authority to legislate for the Indian tribes in all matters," *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978)), set out the relevant standards for TAS status in Section 1377(e). It provided that Indian Tribes may qualify for TAS status for certain CWA purposes, not only with respect to water resources that are held by or on behalf of the Tribe or its members, but also with respect to water resources that are "otherwise within the borders of [the] Indian reservation." 33 U.S.C. 1377(e)(2). Congress, which indisputably has authority to empower the EPA to set water quality standards for navigable waters without regard to who owns the underlying submerged lands, directed EPA to allow qualifying Indian Tribes to make those determinations (within the parameters of the federal statutory Clean Water Act program) for all

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[6] For the purposes of the Equal Footing Doctrine, navigable waters are those that were navigable in fact at statehood. *United States* v. *Holt State Bank*, 270 U.S. 49, 56 (1926). Navigable streams or lakes are those on "which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Ibid.* Contrary to petitioner's contention (Pet. 19), EPA has not conceded that petitioner owns the beds of the navigable waters of the Reservation. Pet. App. 44a, 52a. The determination of navigability requires a fact-intensive inquiry for each water body. There is no evidence in the record of this case, one way or the other, on the questions of what water bodies were navigable in fact at the time of Wisconsin's statehood in 1848 and what property interest petitioner has retained in the beds under those water bodies.

waters within the exterior boundaries of their reservations. As the court of appeals correctly observed, "[b]ecause [petitioner] does not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now complain about the federal government allowing tribes to do so." Pet. App. 9a-10a.[7]

Congress's direction that EPA may grant a qualifying Tribe TAS status with respect to all waters within the borders of a reservation is particularly appropriate in this case, because the Reservation contains no lands owned in fee by non-members of the Tribe. Rather, the Reservation uplands indisputably consist entirely of lands owned wholly by the United States in trust for the Band, which has regulatory authority over all of its members. Cf., *e.g.*, *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001) (Navajo Nation does not have inherent power to tax non-Indian on non-Indian fee land on Reservation). EPA properly concluded, in light of those facts, that the Band "necessarily possess[es] authority over all persons on Reservation lands who may be engaging in activities that may affect the quality" of the Reservation's waters. Pet. App. 45a. Thus, EPA concluded that, even if the State holds title to certain submerged lands, the Band's authority is nonetheless sufficient to "adequately regulate virtually all activities which might affect the quality of Reservation waters." *Ibid.* Under those circumstances, the

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[7] Significantly, neither Section 1377 of the CWA nor its legislative history mentions the Equal Footing Doctrine or submerged lands. Furthermore, the court of appeals found that petitioner has waived any claim that Rice Lake and other water bodies are somehow not "within the borders" of the Reservation. Pet. App. 7a.

court of appeals held that it was "reasonable for the EPA to determine that ownership of the waterbeds did not preclude federally approved regulation of the quality of the water." *Id.* at 10a. Petitioner has made no showing that those fact-specific findings are erroneous.

Contrary to petitioner's assertions (Pet. 19), the court of appeals' decision does not conflict with this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981). Petitioner essentially argues that *Montana* stands for the proposition that, if a State holds title to submerged lands, then a Tribe may never exercise any regulatory authority respecting the overlying waters. But *Montana* contains no such holding. In that case, this Court determined that the State owned the bed of the Big Horn River. See *id.* at 556-557. It nevertheless did not find the State's ownership dispositive of the Tribe's authority to regulate non-member fishing and sport hunting in and on those waters. Compare *id.* at 550-551 n.1, with *id.* at 557-567. Petitioner's understanding of *Montana* and its consequent assertion that this case conflicts with *Montana* are accordingly wrong.

The Court stated in *Montana* that, as a general rule, Tribes lack inherent authority to regulate the conduct of non-members on non-Indian lands within reservations. 450 U.S. at 557-567. But the Court recognized that the general rule is subject to important exceptions. In particular, the Court stated:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566. See, *e.g.*, *Brendale*, *supra*. EPA has taken guidance from *Montana* in determining whether a Tribe is entitled to TAS status under Section 1377(e) of the CWA. It has elected to "evaluat[e] whether a tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation" by reference to "the evolving case law as reflected in *Montana* and *Brendale*." Pet. App. 96a. EPA conducted that evaluation in this case and found that, because the Band depends on the water resources at issue for its livelihood and cultural integrity, and because the Band's reservation contains no non-member fee lands, granting the Band authority to determine water quality standards for those waters is consistent with *Montana*. *Id* at 45a-47a. Hence, EPA's grant of TAS status to the Band pursuant to Section 1377(e) is fully compatible with *Montana*.

As the court of appeals correctly recognized, the Band's entitlement to TAS status ultimately depends on the authority that Congress made available to Indian Tribes through Section 1377(e). Unlike *Montana*, this case does not arise out of a Tribe's bare assertion of inherent authority, but under the specific provisions of the CWA, which establishes a complex regulatory scheme and charges an expert agency with responsibility to coordinate the activities of the federal government, the States, and Indian Tribes. See 33 U.S.C. 1377(e). Section 1377(e) and EPA's implementing regulations allow eligible Tribes to play a role with respect to all water resources within their reservations and do not draw the distinction that petitioner urges.[8]

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[8] Petitioner relied heavily below (Pet. App. 8a, 30a-31a) on the court of appeals' decision in *Wisconsin* v. *Baker*, 698 F.2d 1323,

4. Petitioner also contends (Pet. 22-25) that EPA has misinterpreted this Court's post-*Montana* precedents. There is no merit to that contention. Petitioner primarily asserts (Pet. 24) that this Court's decision in *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), narrowed the *Montana* exception such that EPA cannot rely on the Band's interest in the "health and safety" of its members in granting TAS status. That is not so. In *Strate*, this Court held that a Tribe's inherent sovereignty did not extend so far as to create a tribal court forum for a "commonplace state highway accident claim." 520 U.S. at 459. The Court did not, however, narrow the *Montana* exception. To the contrary, *Strate* identified *Montana* as the "pathmarking case concerning tribal civil authority over nonmembers" and reaffirmed the *Montana* test verbatim. *Id.* at 445; see

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1335 (7th Cir.), cert. denied, 463 U.S. 1207 (1983), but the court correctly recognized that the *Baker* decision is inapposite. The court of appeals ruled in *Baker* that a Wisconsin Tribe was not entitled to regulate non-member hunting and fishing on lakes within its reservation because the State held title to the lake beds. The court nevertheless left open the possibility of tribal regulation, even when the State owned the lake beds, where necessary to protect the "'political integrity, the economic security, or the health or welfare' of the Band." *Id.* at 1335 (quoting *Montana*, 450 U.S. at 566). As the court of appeals below recognized, limitations on tribal regulation of hunting and fishing on non-tribal lands within a reservation are of little or no relevance here where the issue is tribal authority to set water quality standards pursuant to the CWA. See Pet. App. 8a-9a. Hunting and fishing rights "have traditionally been the subject of state regulation," *id.* at 8a, while "the ultimate authority for the water quality standards lies with the federal EPA, not the state of Wisconsin (which itself has acted only pursuant to federal delegation)." *Ibid.*

Nevada v. *Hicks*, 533 U.S. 353, 358 (2001) (quoting *Strate*).[9]

Here, the record shows that water quality is particularly important to the Band since the Band "is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines, and raw materials." Pet. App. 4a. The court of appeals based its decision, in part, on the Band's "unusual" reliance on water resources, *ibid.*, and left "for another day" the question as to how far tribal authority might extend on a different set of facts. *Id.* at 14a. In light of EPA's Tribe-by-Tribe approach, petitioner cannot credibly claim (Pet. 23) that a finding of tribal regulatory jurisdiction is necessarily "guarantee[d]" in every instance. To the contrary, the court of appeals' analysis was based on the facts in the record before it, which show that EPA correctly found that impairment of water quality would have a serious and substantial effect on the health and welfare of the Band because its "water resources are essential to its survival." Pet. App. 13a.

Petitioner also errs (Pet. 24-25) in asserting that tribal authority may be invoked only where the record reflects "a real" threat to the Tribe arising from wholly inadequate federal and state oversight. In support of that contention, petitioner again primarily relies on

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[9] Moreover, the effects of water pollution are far more threatening to a Tribe than isolated traffic accidents. As the court of appeals in *Montana* v. *EPA* explained, "the conduct of users of a small stretch of highway has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water source." 137 F.3d at 1141. See *Albuquerque*, 97 F.3d at 423 (observing that the authority to establish water quality standards "is in accord with powers inherent in Indian tribal sovereignty").

Montana and *Strate*. But that is not what those decisions say. This Court determined in *Montana* that a Tribe lacks inherent authority to regulate non-member activity unless such activity threatens the Tribe's political integrity, economic security, or the "subsistence or welfare of the Tribe." 450 U.S. at 566. The Court noted that, in some circumstances, the State's failure to manage nonmember activities may itself create a threat to the Tribe's political integrity, economic security, or health or welfare that would warrant a Tribe's taking regulatory action. *Id.* at 566 n.16.[10] See *Lower Brule Sioux Tribe* v. *South Dakota*, 104 F.3d 1017, 1023 (8th Cir.), cert. denied, 522 U.S. 816 (1997). It did not, however, limit tribal regulatory authority to circumstances in which State or federal regulation was wholly inadequate.[11]

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[10] This Court stated:

> Similarly, the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag, or creel limits in such a way as to impair the [Tribe's] treaty rights to fish or hunt, or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State.

450 U.S. at 566 n.16.

[11] Likewise, this Court's decision in *Strate* supports no such requirement. As discussed above, *Strate* held that a tribal court lacked jurisdiction over a tort case arising from a traffic accident between non-members on a portion of state highway crossing an Indian reservation. This Court concluded that the *Montana* test was not satisfied because tribal jurisdiction over an accident involving only non-members was not "crucial to the 'political integrity, the economic security, or the health or welfare of the [Tribe]'" and was not necessary to protect tribal self-government. 520 U.S. at 459. The Court noted that a state judicial forum was available to resolve the dispute, but it did not suggest that tribal

Attachment AV

Memorandum of Agreement Between The Lac du Flambeau Band of Lake Superior Chippewa Indians and The Department of Natural Resources of the State of Wisconsin

Memorandum of Agreement
Between
The Lac du Flambeau Band of Lake Superior Chippewa Indians
and
The Department of Natural Resources
of the
State of Wisconsin

WHEREAS, on April 9, 1996 the Department of Natural Resources and the Lac du Flambeau Tribe agreed, as summarized in an April 10, 1996 letter from Secretary George Meyer to Chairman Tom Maulson that the Lac du Flambeau Band of Lake Superior Chippewa Indians (hereinafter the Tribe) and the Wisconsin Department of Natural Resources (hereinafter the Department) would work cooperatively to reduce the Tribe's walleye declarations in a manner that would allow the State of Wisconsin to maintain a walleye bag limit of three (3) walleyes on off-reservation lakes, subject to the Chippewa spearing rights guaranteed by treaty, and calculated pursuant to s. 20.037, Wisconsin Administrative Code, and the Department agrees to use appropriate fisheries management techniques in order to support both a subsistence and sport fishery. It is further understood and agreed that the Tribe cannot regulate the fishing practices of the other Chippewa Bands in abiding with the terms and conditions of this agreement, and therefore clearly states that it is neither the regulator or guarantor of the three (3) bag walleye limit.

WHEREAS, the letter of George Meyer, Secretary of the Wisconsin Department of Natural Resources dated April 10, 1996 and the letter of Tom Maulson, Tribal Chairman dated April 12, 1996 represents the basis for the execution by the parties of this Agreement. Chairman Maulson and Secretary Meyer mutually respect and honor the government to government relationship that exists between the Tribe and the State government. The State recognizes and accepts the fact that other Tribal governments have their own concerns, issues and priorities which the State may address on an individual tribal basis, and

WHEREAS, the letters of April 10 and 12, 1996 represent the basis for the execution by the parties of this agreement.

NOW, THEREFORE, the parties agree as follows:

STATE FISHING APPROVALS

1. The State shall attempt to maintain, within the boundaries of the reservation, a minimum of not less than four vendors for the sale of State Fishing Approvals. For the purpose of this Agreement, the boundaries of the reservation are described in Exhibit "A" attached hereto and incorporated into this Agreement by reference. Reservation throughout this agreement shall mean the Lac du Flambeau Indian Reservation only.

2. In addition thereto, the Tribe and its authorized agents shall be authorized by the State to sell on behalf of the State, State Fishing Approvals as defined in Paragraph 6. All state approvals held by the Tribe remain the property of the Department until sold. At the end of the license year each type of approval unsold shall be returned to the Department. State fishing approvals shall be sold at prices established by the Department and in a manner consistent with Department's issuance procedures. The Department agrees to provide the Tribe with training in these procedures.

3. All of the State fishing revenue derived from Paragraph 2 of Section entitled "State Fishing Approvals" shall belong to the Tribe and shall be paid to the Tribe, less any issuance fees due Vilas County or State Fishing approval vendors, and shall be retained by the Tribe for use by the Tribe for fisheries management on the reservation on public navigable waters except that for sports licenses the Tribe may only retain the dollar value of a resident annual fishing license for a resident sport license and the dollar value of a non-resident annual fishing licenses for non-resident sport licenses. The Tribe shall remit the balance of the revenue generated by the non-fishing portion of the Sport Licenses to the Department on a monthly basis.

4. The Tribe shall provide to the State an accounting of all State fishing approvals sold by the Tribe and its authorized agents on a monthly basis. Said accounting will include the number and type of each State Fishing Approval sold by the Tribe.

5. State Fishing Approval vendors may continue to sell State Fishing Approvals and trout stamps of the type authorized by ss. 29.14, 29.145 (2) and (3), 29.146, 29.147 and 29.149(3), Stats. (hereinafter referred to as Fishing Approvals) on the Reservation pursuant to s. 29.09, Stats.. The Tribe will receive the fishing portion of the Resident and Non-Resident Sports Licenses sold within the boundries of the reservation by State vendors. The dollar value received by the Tribe will equal the dollar value of the resident or non-resident fishing approval. All State Fishing Approval revenue received by the Department from approvals sold on the reservation after the effective date of the 1997-1999 state budget bill, less any issuance fees retained by Vilas County or State Fishing Approval vendors under s. 29.09(7), Stats., shall be remitted by the Department to the Tribe on a monthly basis for use by the Tribe for fisheries management on the reservation on public navigable waters. Fisheries management shall include all fish management related activities including fishery administrative expenses and costs. The revenues received by the Tribe shall be paid into a separate Tribal Natural Resource Account.

6. The Department shall provide the Tribe with an accounting of the number and type of each State Approval sold on the reservation by State Fishing Approval vendors, on a monthly basis. Records of all State Fishing Approval sales including copies of each Approval sold and the revenues received are upon reasonable notice to be made available to Tribal Wardens during normal business hours of the State and/or its vendors. The Approval types covered by this section are as follows:

STATE FISHING APPROVALS AUTHORIZED FOR SALE

Resident
Resident 2-day Sports Fishing License
Resident Husband/Wife
Non Resident Annual
Non Resident Family
Non Resident 15 Day
Non Resident 4 Day
Non Resident 15 Day Family
Resident Sports License
Non-Resident Sports License
Trout Stamps

State fishing approvals sold by the tribe pursuant to the agreement may only be sold to applicants appearing in person on the reservation

TRIBAL FISHING APPROVALS

1. The Lac du Flambeau Band of Lake Superior Chippewa Indians may issue Tribal Fishing approvals equivalent to the type authorized by ss. 29.14, 29.145 (2) and (3), 29.146, and 29.149(3), Stats., and retain the proceeds subject to the following conditions:

(a) Tribal Fishing Approvals may only be sold by the Tribe, or Tribal Fishing Approval vendors located on the reservation. For the purpose of this Agreement, the boundaries of the reservation are described in Exhibit "A" attached hereto and incorporated into this Agreement by reference.

(b) Tribal Fishing Approvals shall be sold at the prices established by s. 29.092 and shall be for the term established by s. 29.093.

(c) Tribal Fishing Approvals may not be discounted and may not be sold in conjunction with discount coupons, promotions or merchandise.

(d) Each Tribal Fishing Approval shall state the effective dates including the date of expiration. Each Tribal Fishing Approval sold shall bear upon its face a true signature of the licensee, the date of issuance and the signature of the issuing Tribal Officer or the Tribal Fishing Approval vendor.

(e) Tribal Fishing Approval blanks shall be numbered consecutively at the time of printing in a separate series for each kind of approval. Each Approval blank shall be provided with a corresponding stub (or carbon) numbered with the serial number of the Tribal Fishing Approval. Each requisition of the Fishing Approval blanks shall specify any serial numbers to be printed on the license blank. The Tribe, by virtue of its sovereignty,

shall design, print, and issue Tribal Fishing Approvals for itself and for its authorized Tribal Fishing Approval vendors.

(f) The Tribe shall notify the State of the number of each class of Tribal Fishing Approvals sold

(g) The receipts from Tribal Fishing Approval sales are to be used by the Tribe for fisheries management on the reservation, as previously described in State Fishing Approvals, Section 1, above.

(h) Records of all Tribal Fishing Approval sales including copies of each Approval sold are upon reasonable notice to be made available to Wardens of the Department during normal business hours of the Tribe or its vendors. This solitary permission by the Tribe for the inspection of tribal records by Wardens of the Department is for law enforcement purposes only. It is clearly understood and agreed that the State has no right whatsoever to inspect tribal records, except as allowed by this agreement.

(i) The Tribe agrees to retain all records of the Tribal Fishing Approval sales sold for a period of two years following the close of the license year.

2. Tribal Fishing Approvals are valid in the same manner as the equivalent State Fishing Approvals issued under ss. 29.14, 29.145 (2) and (3), 29.146, 29.147, 29.149(3), and shall be valid through out the State of Wisconsin for fishing purposes. Tribal fishing approvals sold pursuant to this section may only be sold to applicants appearing in person on the reservation.

ALL-TERRAIN VEHICLES

1. The Tribe has the authority to issue all-terrain vehicle registrations for public and/or private use equivalent to the type required by s. 23.33(2)(a), Stats., and retain the proceeds subject to the following conditions.

(a) Tribal ATV registrations may only be sold by the Tribe or its authorized agent on the reservation. For the purpose of this Agreement, the boundaries of the reservation are described in Exhibit "A" attached hereto and incorporated into this Agreement by reference.

(b) Tribal registrations shall be sold at the prices established by s. 23.33(2)(c), (d) and (e), Stats., and shall be for the terms established by s. 23.33(2)(f) and (g), Stats.

(c) Tribal registrations may not be discounted and may not be sold in conjunction with discount coupons, promotions or merchandise.

(d) The Tribe shall use registration decals and applications that are substantially similar to those employed by the registration programs of the State with regard to color, size,

legibility, information content, and placement on the ATV. Said Tribal Registration decal shall be valid for operation of said ATV anywhere in the State of Wisconsin or anywhere n State registered ATV operates.

(e) The Tribe shall employ a sequential numbering system that includes a series of letters or initials that identify the Tribe as the issuing authority.

(f) The Tribe shall provide registration information to the State in one of the following ways:

By transmitting all registration information to persons identified in the agreement, for incorporation into the registration records of the State, within two working days, or in the alternative,
By establishing a 24-hour per day data retrieval system, consisting of either a law enforcement agency with 24-hour per day staffing or a computerized data retrieval system to which law enforcement officials of the State have access at all times.

(g) By June 1 of each year, the Tribe shall notify the State of the number of each class of registration sold.

(h) The receipts for non-tribal registration sales are to be used by the Tribal Natural Resource Department for ATV management on the reservation, i.e., the costs associated with registering ATV's, the cost of an advisory council, costs of a ATV safety and accident reporting program, costs of law enforcement, costs of developing, maintaining and rehabilitation ATV trails, and costs of administering the ATV trail program, including salaries, fringes, support and capital costs, in such a manner as to create a safe and scenic environment for the use of all ATV vehicles on the reservation.
Records of all registration sales including copies of each application are to be made available to the Department during normal business hours in addition to the procedure noted above.

(i) The Tribe agrees to retain all records of registration sales including copies of each application for a period of two years following the close of the registration year.

2. Tribal all-terrain vehicle registrations are valid in the same manner as the equivalent registration issued under s. 23.33(2)(a), Stats.. Tribal registrations sold pursuant to this section may only be sold to applicants appearing in person on the reservation.

SNOWMOBILES

1. The Tribe may issue snowmobile registrations for public and private use equivalent to the type required by s. 350.12(3)(a), Stats., and retain the proceeds subject to the following conditions:

(a) Tribal snowmobile registrations may only be sold by the Tribe or its authorized agent on the reservation. For the purposes of this Agreement, the boundaries of the reservation are described in Exhibit "A" attached hereto and incorporated in this Agreement by reference.

(b) Tribal registrations shall be sold at the prices and terms established by s. 350.12(3)(a).

(c) Tribal registrations may not be discounted and may not be sold in conjunction with discount coupons, promotions or merchandise.

(d) The Tribe shall use registration decals and applications that are substantially similar to those employed by the registration programs of the State with regards to color, size, legibility, information content, and placement on the snowmobile. Said Tribal Registration decal shall be valid for operation of said snowmobile anywhere in the State of Wisconsin or anywhere a State registered snowmobile operates.

(e) The Tribe shall employ a sequential numbering system that includes a series of letters or initials that identify the Tribe as the issuing authority.

(f) The Tribe shall provide registration information to the State in one of the following ways:

> By transmitting all registration information to persons identified in the agreement, for incorporation into the registration records of the State, within two working days, or in the alternative
> By establishing a 24-hour per day data retrieval system, consisting of either a law enforcement agency with 24-hour per day staffing or a computerized data retrieval system to which law enforcement officials of this State have access at all times.

(g) By June 1 of each year the Tribe shall notify the State of the number of each class of registration sold.

(h) The receipts for Tribal registration sales are to be used by the Tribal Natural Resource Department for snowmobile management on the reservation, i.e., the costs associated with registering snowmobile, the cost of an advisory council, costs of a snowmobile safety and accident reporting program, costs of law enforcement, costs of developing, maintaining and rehabilitating snowmobile trails, and costs of administering the snowmobile trail program, including salaries, fringes, support and capital costs, in such a manner as to create a safe and scenic environment for the operation of snowmobiles on the reservation in accordance with Tribal Codes and Ordinances governing this activity. Records of all registration sales including copies of each application are to be made available to the Department during normal business hours in addition to the procedure noted above.

(i) The Tribe agrees to retain all records of registration sale including copies of each application for a period of two years following the close of the registration year.

2. Tribal snowmobile registrations are valid in the same manner as the equivalent registration issued under s. 350.12(3)(a), Stats.. Tribal registrations sold pursuant to this section may only be sold to applicants appearing in person on the reservation.

AUTHORITY OF TRIBE TO SELL LICENSES

WHEREAS, the State recognizes the sovereign right of the Tribe as a sovereign may sell and collect fees for issuance of Tribal Fishing Approvals, ATV registrations, boat registrations, and snowmobile registrations on the reservation, and

WHEREAS, the State recognizes that the Tribe has made certain fishing concessions as contained herein and that it would be unfair to deprive the Tribe of these revenues because of the lengthy procedure necessary to approve the 1997-1999 budget,

NOW, THEREFORE, IT IS AGREED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. The Department, on behalf of the State of Wisconsin, agrees to seek authorization for the agreement in the 1997-1999 legislative process.

2. The parties agree that introduction of state legislation authorizing tribal boating registration for non-members may occur before or after Coast Guard approval of tribal registration programs.

SPECIAL CONSIDERATIONS FOR THE 1997 SPRING SPEARING SEASON

WHEREAS, the parties recognize that the Tribe will do everything reasonably possible to insure a three (3) bag limit in the ceded territory in lakes harvested by the Tribe and abide by the terms of this agreement, and

WHEREAS, the Department will do everything reasonably possible to assure a three (3) walleye bag limit for the sport fisherman does not adversely affect the walleye fishery on lakes harvested by the Tribe, and

WHEREAS, the necessary approval of this agreement in the 1997-1999 legislative process will not take place prior to the 1997 Spring Spearing Season and the 1997-1999 Budget Process, and

WHEREAS, as and for just compensation for any financial losses sustained by the tribe in foregoing the exercise of its Treaty Rights the State and the Tribe in mutual accord,

NOW, THEREFORE IT IS AGREED that the Department shall pay as just and proper compensation the sum of one hundred thousand dollars ($100,000.00) to be used by the Tribe for fisheries management (i.e. Fish Hatchery Operations) pursuant to section "State Fishing Approvals", Paragraph 3, Supra even if the State Legislature does not pass this agreement, and

IT IS FURTHER AGREED that said sum shall be paid by the State to the Tribe no later than August 1, 1997.

MISCELLANEOUS

1. Severability

It is understood and agreed by the parties that if any part, term, or provision of this contract is held by the courts to be illegal, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the contract did not contain the particular part, term, or provision held to be invalid.

2. Binding Effect

The covenants and conditions contained in this agreement shall apply to and bind the parties.

3. Dispute Resolution and Termination

This agreement may be canceled by either party for cause upon six months notice. Such notice shall be in writing and subscribed by the respective signatory to this agreement or its successor. An example of cause, would be if a three walleye bag limit could not be maintained in lakes covered by this agreement, or if the State eliminates reciprocity with respect to Tribal fishing approvals and registrations. However, the parties agree to exercise full good faith in apprising each other of such grievances and problems in implementing this agreement as may arise, and to cooperate to resolve such matters to the greatest extent possible including mediation.

4. Entirety of Agreement

Both parties agree that when this agreement is submitted to the Legislature for approval in the State's 1997-1999 budget, that this Agreement must be approved in its entirety. That after approval it will continue to exist and be in full force and effect until modified by the parties jointly in writing or otherwise terminated.

5. Non Waiver Position

Nothing in this Agreement shall be deemed to be a concession by any party as to the existence or lack of jurisdiction by the State over Lac du Flambeau members or by Lac du Flambeau over non-members. Nothing herein shall be a grant of jurisdiction by Lac du Flambeau to the State or the State to Lac du Flambeau. This Agreement is not intended to alter existing jurisdiction of any party, and by approving the Agreement no party is conceding or agreeing to any jurisdiction in any other party which otherwise would not exist. The acceptance of this agreement shall not in any respect constitute a determination

as to the merits of any allegation or contention, whether legal or factual, made by either party in any preceding now or in the future.

6. Report Provisions

The Tribe upon written request from the Governor/Secretary of the Department of Natural Resources to the Tribal Chairman/Natural Resource Director shall provide the Department a written annual report outlining the fisheries, ATV, snowmobile and boating accomplishments pursuant to this agreement. The State shall provide the Tribe a written annual report outlining the natural resource activities which occurred on the reservation by the Department, upon written request from the Tribal Chairman/Natural Resource Director to the Governor/Secretary of the Department of Natural Resources. Any person or commercial entity registering an ATV or snowmobile with the Tribe shall be required to submit to the Tribe or its authorized Tribal Approval Vendor, evidence of proof of payment of sales tax or a remittance of sales tax to the State. For any ATV and snowmobile for which a sales tax is due, the Tribe will, on behalf of the State, collect said tax and submit it to the Department of Revenue on a monthly basis. The Tribe, in no way, form, or fashion shall assume any liability for sales tax due by the purchaser to the State in registration of said ATV or snowmobiles.

1. Before completing a transfer registration of an ATV or snowmobile, the Tribe agrees to verify ownership with the State.

2. The Tribe agrees to apply all State laws relating to eligibility to purchase approvals.

IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS DOCUMENT IN THE STATE OF WISCONSIN ON THE DATES SET FORTH BELOW.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By George E. Meyer
George Meyer, Secretary, on behalf of the State of Wisconsin

Dated: April 10, 1997

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS

By
Tom Maulson, President

Dated: 4/10/97

Attachment AW

1. Annual Funding Agreement Between Lac du Flambeau and BIA for the Fish and Game Management Program (excerpts)

2. Annual Funding Agreement Between Lac du Flambeau and BIA for a Water Resources Program (excerpts)

SUPPORT SERVICES

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES

2. AMENDMENT/MODIFICAITON NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
Five (5)	DEC 2 2 2005		

6. ISSUED BY — CODE

Awarding Officer
Bureau of Indian Affairs
Great Lakes Agency
916 West Lakeshore Drive
Ashland, WI 54806

7. ADMINISTERED BY (If other than Item 6) — CODE

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)

Lac du Flambeau Band of Lake Superior Chippewa Indians
P.O. Box 67
Lac du Flambeau, WI 54538

CODE	FACILITY CODE

(X)	9A. AMENDMENT OF SOLICIATION NO.	9B. DATED (SEE ITEM 11)

X	10A. MODIFICATION OF CONTRACT/ORDER NO.	10B. DATED (SEE ITEM 11)
	CTF55T432BG	02/15/05

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment your desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

See Attachment A

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

CHECK ONE	
	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
X	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: Mutual Agreement by both parties
	D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return Original copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Change in Accounting and Appropriation Data:

1. Increase contract by $553,396.00 from $674,227.00 to $1,227,623.00 (FY06 allocation and 75% of contract support).

Insert FY'06 Annual Funding Agreement.

No other changes

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)
Victoria Doud, President	Susan A. Deragon, Awarding Official BIA-2001-L1-000034

15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
Victoria Doud (Signature of person authorized to sign)	12-06-05	Susan A. Deragon (Signature of Contracting Officer)	DEC 2 2 2005

NSN 7540-01-152-8070
Previous edition unusable

STANDARD FORM 30 (REV. 10-83)
Prescribed by GSA FAR (48 CFR) 53.243

SECTION C
Statement of Work

Sec. 1. Scope of Bureau Program(s) to be Performed.

1. Purpose. To state the terms conditions, and work to be performed under the contract and the rights and responsibilities of each of the parties, to enable the Contractor to acquire and utilize all resources made available by the Bureau of Indian Affairs (BIA) for the delivery of services and programs specified herein, pursuant to the Pub. L. 93-638, as amended, and other applicable Federal laws.

   (a) The Contractor shall obtain from the BIA all such funds and other resources made available for the benefit of the tribe for all programs to be operated and services to be delivered by the Contractor through this contract on behalf of the BIA, except for "Trust" and "executive functions" of the BIA which are considered non-contractible.

   (b) The BIA shall transfer to the Contractor all such funds and other resources made available for the benefit of the Tribe through this contract in the most expeditious manner authorized by law, and shall provide technical support and assistance at the request of the Contractor and as provided herein.

   (c) The Contractor shall exercise full discretion over the funds made available subject only to the provisions of this contract and Federal law.

2. Fair and Uniform Services. The Contractor agrees that any services or assistance provided to Indians under the contract shall be provided in a fair and uniform manner.

Sec. 2. Statement of Work. The Contractor shall administer programs under this agreement in accordance with its own laws and policies which are incorporated herein by reference. The provisions of applicable Federal

Regulations shall apply, unless such regulations have been waived by the Secretary. Such regulations are incorporated in this agreement by reference.

1. Program(s) to be Performed by Contractor. The Contractor shall conduct programs and services to address Tribal priorities and needs as determined by the Tribal Council. Programs to be conducted shall include any and all programs authorized by law, for which funds have been appropriated to the BIA or made available from other agencies through the BIA. Funds made available may be utilized to acquire other resources to further the objectives of this agreement. The Contractor shall operate programs under the following categories:

(a) Natural Resources Programs. Programs to acquire, manage, protect, develop and enhance tribal resources. Such programs may include land, water, fish and wildlife, range, forestry, irrigation, and other programs designed to acquire, manage, develop and enhance tribal resources.

The Bureau program(s) to be performed by the Contractor under this contract are as follows:

Program A: Wildlife and Parks.

The funds will be used for the purchase of field supplies for Wildlife Management projects for 2006.

Program B: Fish Hatchery Operations and Maintenance.

(1) The Contractor will provide qualified personnel including a Hatchery Manager/Supervisor, Assistant Hatchery Manager, Spawners, Night Watchmen, and Field Workers to assure successful operation and maintenance of the hatchery facility and all related equipment.

(2) In order to maintain accurate fish rearing information, the hatchery crew will continue to record all pertinent spawning and hatching information. Monitoring will

include the number of eggs collected, number of eggs hatched, number of fish stocked, oxygen concentration, water temperature, etc

(3) Maintain liaison with other tribes and public agencies engaged in fish hatchery operations.

Program C: Fish Culture.

(1) The Contractor will provide qualified personnel to complete and successfully operate and maintain various tribal rearing ponds and raceways for projection of fingerling size fish.

(2) Fingerling production will include, but not be limited to, walleye, muskellunge, white sucker, brown, and rainbow trout. Note: Lake Sturgeon fry and fingerlings may be produced if Tribal Wildlife Grant funding becomes available from the USFWS. A production report will be submitted upon completion of the contract that summarizes this operation.

(3) Based on hatchery and rearing success and data collection from the lake assessment program, an estimated fourteen (14) reservation lakes will be stocked in 2005 under this contract. These lakes are Fence, White Sand, Crawling Stone, Pokegama, Flambeau, Long Interlaken, Ike Walton, Little Trout, Upper Sugarbush, Middle Sugarbush, Lower Sugarbush, Shishebogama, Gunlock, and Little Crawling Stone. The number of lakes and the lakes to be stocked may change based on fisheries management objectives and the number of fish produced.

Program D: Fisheries Management/Research.

The Contractor will continue this ongoing program through the following activities:

(1) Conduct fish population assessments on Flambeau, Long, Polkegama, Big Crawling Stone, Bear River Bridges No.1 and No.2, and White Sand Lakes. Data collected will estimate the young-of-the-year walleye production.

(2) Conduct creel surveys during the fishing season to determine harvest and efforts by fishermen on adult walleye population. The need for a survey/type of survey and the reservation lakes to be surveyed will be determined by the Fish and Game Director.

(3) Insure that fish populations are managed in accordance with current tribal management principals and techniques.

(4) Provide recommendations and technical assistance to tribal regulating bodies to aid them in establishing fishing seasons, bag and size limits, closed areas and regulations.

(5) Maintain liaison with other agencies engaged in fisheries management and research. Such activities will be coordinated when possible to achieve maximum benefits to the Tribe.

Program E: Habitat Improvement.

The Contractor will accomplish the following activities under the program:

(1) Emergency beaver control work will continue but at a very limited basis. This includes trapping and dam removal.

Program F: Game Management and Research.

(1) If time and personnel are available, conduct a white tail deer population survey.

(2) If time and personnel are available, continue the ruffed grouse drumming count and bear bait surveys.

(3) Insure that big game species are managed in accordance with current accepted tribal management principles and techniques.

(4) Evaluate the release of Eastern Wild Turkeys on the Lac du Flambeau Indian Reservation visual sighting information.

(5) Provide recommendations and technical assistance to tribal regulating bodies to aid them in establishing hunting and trapping seasons, quotas, and regulations for small game, big game, and waterfowl.

(6) Maintain liaison with other agencies engaged in wildlife management and research. Such activities will be coordinated when possible to achieve maximum benefits to the tribe.

(7) Provide technical assistance to the Great Lakes Indian Fish and Wildlife Commission to allow tribal members to exercise their hunting, fishing, and gathering rights in the ceded territory as party to the Lac Courte Oreilles vs. Voigt Decision.

Program G: Resource Marketing.

Under this program the Contractor will accomplish the following activities:

(1) Develop and utilize markets for the sale of eyed-eggs, fry, fingerlings, and adult fish species produced or harvested by the Tribal Fish Hatchery.

(2) The Resource Marketing Program will be responsible for implementing a tribal fishing license issuing plan for vendors within the exterior boundaries of the

reservation. The plan will include, but not be limited to, the following: identify vendors, write a vendor handbook on license issuance, distribute fishing licenses, collect revenues, etc. All revenues will be placed in the Tribal Fisheries License Revenues account and be used to conduct fisheries management activities. The sale of ATV and snowmobile registrations will be the responsibility of the Tribal Department of Motor Vehicles.

Program H: Tribal Campground Management.

(1) Program personnel, equipment, and supplies will be used to operate, maintain, and administer the 72 Recreational Vehicle (RV) slip tribal campground during the tourism seasons. The tribal campground is located on Highway 47, south of the Tribal Fish Rearing Complex.

(2) All proceeds from Part 1 are to be placed in the Campground Earned Revenue Account to be used solely to support and maintain the Campground or other natural resource projects.

Program I: Circle of Flight Projects.

Contingent on the availability of funding, Circle of Flight Projects will be accomplished during the fiscal year and be determined at later date.

Program J: NOXIOUS WEEDS

If funding becomes available, noxious weed projects will be conducted.

Project K: Fish Hatchery Maintenance

If funding becomes available, Fish Hatchery Maintenance projects will be conducted.

(C) Other Programs. The Tribe can establish programs in other categories funded by BIA or programs of its own design.

Sec. 3. Contract Term. This contract shall be for the term commencing **Date of Award** and ending **September 30, 2007**. For Incurrence of cost authorization see Incurrence of Cost provision Section B, Sec. 2.3. For Pre-Award and/or start-up costs authorization see Pre-Award and/or Start-Up Costs provision Section B, Sec. 5.

Sec. 4. Non-Contracted Portions of the Bureau of Indian Affairs Program(s). The Government, through the Bureau of Indian Affairs, shall:

1. Technical Assistance. Provide technical assistance and guidance, as needed, to the Contractor. The Awarding Official and/or his authorized representative will be available to provide assistance to the Contractor as needed, or upon written request of the Contractor.

2. Monitoring. The Awarding Official and/or his authorized representative will monitor Contractor performance under this contract. This monitoring function will include, but not be limited to, the following:

   (a) Periodic on-site visits, as needed and/or requested by the Contractor.

   (b) Official Monitoring Sessions, these shall be scheduled in advance of the visit.

ATTACHMENT 2

DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

MINNEAPOLIS AREA OFFICE

GREAT LAKES AGENCY

PUBLIC LAW 93-638, AS AMENDED

SECTION 108 MODEL CONTRACT

ANNUAL FUNDING AGREEMENT

WITH THE

Lac du Flambeau Band of Lake Superior Chippewa

CONTRACT NO. CTF55T432B2

SUPPORT SERVICES

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

2. AMENDMENT/MODIFICAITON NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	1. CONTRACT ID CODE	PAGE OF PAG
Modification # 8	JAN 3 0 2006			

5. PROJECT NO. (If applicble)	6. ISSUED BY CODE
	Awarding Official Great Lakes Agency Bureau of Indian Affairs 916 Lake Shore Drive West Ashland, WI 54806

7. ADMINISTERED BY (If other than Item 6) CODE

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)

Lac du Flambeau Band of Lake Superior Chippewa Indians
P.O. Box 67
Lac du Flambeau, WI 54538

(X)	9A. AMENDMENT OF SOLICIATION NO.
	9B. DATED (SEE ITEM 11)
X	10A. MODIFICATION OF CONTRACT/ORDER NO. CTF55T432B2
	10B. DATED (SEE ITEM 11) 03/03/04

CODE FACILITY CODE

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)
SEE ATTACHMENT A

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

CHECK ONE	
	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
X	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: Mutual Agreement of Both Parties
	D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return Original copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Modify the accounting and appropriations data.

1.) Increase contract by $39,722 from $109,887 to $149,609.

2.) Insert FY'06 Annual Funding Agreement

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)
Vicki Dowd, Tribal President	Susan A. Deragon, Awarding Official BIA-2001-1-000034
15B. CONTRACTOR/OFFEROR (Signature of person authorized to sign)	15C. DATE SIGNED 1/11/06
16B. UNITED STATES OF AMERICA (Signature of Contracting Officer)	16C. JAN 3 0 2006

SECTION C
Statement of Work

Sec. 1. **Scope of Bureau Program(s) to be Performed.**

1. **Purpose.** To state the terms conditions, and work to be performed under the contract and the rights and responsibilities of each of the parties, to enable the Contractor to acquire and utilize all resources made available by the Bureau of Indian Affairs (BIA) for the delivery of services and programs specified herein, pursuant to the Pub. L. 93-638, as amended, and other applicable Federal laws.

   (a) The Contractor shall obtain from the BIA all such funds and other resources made available for the benefit of the tribe for all programs to be operated and services to be delivered by the Contractor through this contract on behalf of the BIA, except for "Trust" and "executive functions" of the BIA which are considered non-contractible.

   (b) The BIA shall transfer to the Contractor all such funds and other resources made available for the benefit of the Tribe through this contract in the most expeditious manner authorized by law, and shall provide technical support and assistance at the request of the Contractor and as provided herein.

   (c) The Contractor shall exercise full discretion over the funds made available subject only to the provisions of this contract and Federal law.

2. **Fair and Uniform Services.** The Contractor agrees that any services or assistance provided to Indians under the contract shall be provided in a fair and uniform manner.

Sec. 2. Statement of Work. The Contractor shall administer programs under this agreement in accordance with its own laws and policies which are incorporated herein by reference. The provisions of applicable Federal Regulations shall apply, unless such regulations have been waived by the Secretary. Such regulations are incorporated in this agreement by reference.

1. Program(s) to be Performed by Contractor. The Contractor shall conduct programs and services to address Tribal priorities and needs as determined by the Tribal Council. Programs to be conducted shall include any and all programs authorized by law, for which funds have been appropriated to the BIA or made available from other agencies through the BIA. Funds made available may be utilized to acquire other resources to further the objectives of ~~this agreement. The~~ Contractor shall ~~operate programs under the following~~ categories:

(a) Resource Management. Programs to acquire, manage, develop and enhance tribal resources. Such programs may include land, water, fish and wildlife, range, forestry, irrigation, and other programs designed to acquire, manage, develop and enhance tribal resources.

(A) Baseline Assessment of Lakes
Will be finalized this year.

(B) Bear River Stream Gage
Will continue and be incorporated into the watershed assessment.

Long-term project – This U.S. Geological Survey (USGS) Gaging Station No. 05357335 was installed in 1991 to develop a long-term discharge record for the Bear River. Operate and maintain this stream gage in cooperation with the USGS. Joint funding agreement @50/50 cost share with USGS, and the amount provided will provide partial funding. Perform periodic discharge measurements. Collect stage, discharge, and velocity data. Data will be published in the USGS report "Water Resources Data, Wisconsin, Water Year 2006".

(C) Trout River Stream Gage

Will continue and be incorporated into the watershed assessment.

Long-term project - This U. S. Geological Survey Gaging Station No. 0537254 was installed in 1998 to develop a long-term discharge record for the Trout River. Operate and maintain this stream gage in cooperation with the USGS. Joint funding agreement @75/50 cost share with USGS, and the amount provided will provide partial funding. Perform periodic discharge measurements. Collect stage, discharge, and velocity data. Data will be published in the USGS report "Water Resources Data, Wisconsin, Water Year 2006".

(D) Watershed Assessment

During the first year of this two-year project we plan to integrate mapping resources for the reservation; delineate subwatershed boundaries for the Bear River Watershed; develop protocol and investigate hydrology and habitat of the Bear River. This information will lead into the second year to estimate current and future impervious cover, and identify factors that would help classification of individual subwatersheds and areas of concern; and assess stream, river, and lake riparian areas. A final technical summary and watershed assessment/management plan will be issued upon completion of this two-year project.

Sec. 3. Contract Term. This contract shall be for the term commencing Date of Award and ending September 30, 2006. For incurrence of cost authorization see Incurrence of Cost provision Section B, Sec. 2.3. For Pre-Award and/or start-up costs authorization see Pre-Award and/or Start-Up Costs provision Section B, Sec. 5.

Sec. 4. Non-Contracted Portions of the Bureau of Indian Affairs Program(s). The Government, through the Bureau of Indian Affairs, shall:

1. Technical Assistance. Provide technical assistance and guidance, as needed, to the Contractor. The Awarding Official and/or his authorized representative will be available to provide assistance to the Contractor as needed, or upon written request of the Contractor.

2. Monitoring. The Awarding Official and/or his authorized representative will monitor Contractor performance under this contract. This monitoring function will include, but not be limited to, the following:

   (a) Periodic on-site visits, as needed and/or requested by the Contractor.

   (b) Official Monitoring Sessions, these shall be scheduled in advance of the visit.

Attachment AX

❖❖❖

Charles J. Kappler, Indian Affairs, Laws and Treaties,
Vol. I (1904) (excerpts)

INDIAN AFFAIRS.

LAWS AND TREATIES.

Vol. I.

(LAWS.)

Compiled to December 1, 1902.

COMPILED AND EDITED
BY
CHARLES J. KAPPLER, LL. M.,
CLERK TO THE SENATE COMMITTEE ON
INDIAN AFFAIRS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1904.

a permanent reservation for said Indians, be restored to market, is hereby approved, and you will be pleased to carry the same into effect.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

---

*Lac de Flambeau Reserve.**

[Area, 52¼ square miles; treaty September 30, 1854; act of May 29, 1872 (17 Stat., 190).]

DEPARTMENT OF THE INTERIOR,
Office Indian Affairs, June 22, 1866.

SIR: Provision is made in the third section of the second article of the treaty of September 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi, for setting apart and withholding from sale a tract of land lying about Lac de Flambeau, "equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed by the President." (U. S. Statutes at Large, vol. 10, p. 1109.)

As the lands adjoining this lake are about to be offered at public sale, it is important that immediate action should be taken in withdrawing from sale lands necessary for this reservation. The following-described lands were included within a survey made to define the boundaries of this reservation in June, 1863, by A. C. Stunz, surveyor, under the direction of the Superintendent of Indian Affairs, viz: Sections 5 and 6, township 39 north, range 6 east; sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31, and 32, township 40 north, range 6 east; sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31, and 32, township 41 north, range 6 east; all of township 41 north, range 5 east; sections 1, 2, 3, 4, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35, and 36, township 41 north, range 4 east; sections 1, 2, 11, 12, 13, and 14, township 40 north, range 4 east; sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18; township 40 north, range 5 east; the area of the same being 55,630.26 acres.

As this is a less amount of land than is provided for in the treaty for said reservation, I would respectfully recommend that in addition to the foregoing there be reserved from sale, until such time as the boundaries of the reservation are fully defined, the following-described lands which are contiguous to those included in the survey above stated, viz: Sections 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, township 40 north, range 5 east; sections 3, 10, 15, 22, 23, 24, 25, 26, 27, 34, 35, and 36, township 40 north, range 4 east.

Very respectfully, your obedient servant,

D. N. COOLEY, *Commissioner.*

Hon. JAMES HARLAN,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
Washington, June 27, 1866.

SIR: I have received your letter of the 26th instant inclosing a copy of a letter from the Commissioner of Indian Affairs, dated the 22d, requesting the withholding from sale of certain lands on account of the Lac de Flambeau band of Chippewas, under third section, second article, of the treaty of September 30, 1854.

In compliance with your instructions the necessary entries have been made in the records of this office, and the register and receiver at

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*See Appendix II, post, p. 1051.

Stevens Point, Wis., have this day been directed to withhold from sale the land described in the Commissioner's letter. A copy of my letter is inclosed herewith.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Acting Commissioner.

Hon. JAMES HARLAN,
Secretary of the Interior.

[Inclosure.]

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
Washington, June 27, 1866.

GENTLEMEN: In pursuance of the order of the Secretary of the Interior of the 26th instant, the following-described lands will be withheld from settlement or sale on account of the Lac de Flambeau band of Chippewa Indians, to wit: Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35, and 36, township 40, range 4 east; sections 1, 2, 3, 4, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35, and 36, township 41, range 4 east; all of township 40, range 5 east; all of township 41, range 5 east; sections 5 and 6, township 39, range 6 east; sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31, and 32, township 40, range 6 east; and sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31, and 32, township 41, range 6 east.

These lands will be held in reservation for the purpose mentioned, and consequently will not be subject to settlement or sale, and you will so enter them on your plats and tract-books, and advise me when that has been done.

Very respectfully,

JOS. S. WILSON,
Acting Commissioner.

REGISTER AND RECEIVER,
Stevens Point, Wis.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., June 28, 1866.

SIR: For your information I inclose herewith copy of letter of the Commissioner of the General Land Office, transmitting to this Department copy of the order of withdrawal from public sale of certain lands in the vicinity of Lac de Flambeau, Wis., as directed by my letter of the 26th instant.

Very respectfully, your obedient servant,

JAS. HARLAN, *Secretary.*

Hon. D. N. COOLEY,
Commissioner of Indian Affairs.

Red Cliff Reserve.

[Occupied by La Pointe Band of Chippewas; treaty September 30, 1854, and resolution February 20, 1895 (28 Stat., 970).]

GENERAL LAND OFFICE,
September 6, 1855.

SIR: Inclosed I have the honor to submit an abstract from the Acting Commissioner of Indian Affairs' letter of the 5th instant, requesting the withdrawal of certain lands for the Chippewa Indians in Wisconsin, under the treaty of September 30, 1854, referred by the Department to this office on the 5th instant, with orders to take immediate steps for the withdrawal of the lands from sale.

In obedience to the above order I herewith inclose a map, marked A, showing by the blue shades thereon the townships and parts of townships desiring to be reserved, no portion of which are yet in market, to wit: Township 51 north, of range 3 west, fourth principal meridian, Wisconsin; northeast quarter of township 51 north, of range 4 west, fourth principal meridian, Wisconsin; township 52 north, of

No. 1513, by Charles A. Barron, for NW. ¼ NW. ¼ sec. 20, SW. ¼ SW. ¼ sec. 17, and S. ½ SE. ¼ sec. 18, T. 27 N., R. 23 E., made July 5, 1890.

No. 1526, by Enos B. Peaslee, for lot 1, NE. ¼ SE. ¼, and S. ½ NE. ¼ sec. 11, T. 27 N., R. 22 E., made July 14, 1890.

No. 1528, by Harrison Williams, for E. ½ SE. ¼ sec. 19 and W. ½ SW. ¼ sec. 20, T. 27 N., R. 23 E., made July 16, 1890.

No. 1586, by Thomas R. Gibson, for E. ½ SW. ¼, NW. ¼ SW. ¼, and SW. ¼ SE. ¼ sec. 12, T. 27 N., R. 22 E., made October 17, 1890.

Christopher Robinson (date and number not given) made homestead application for SW. ¼ SW. ¼ sec. 12, and lots 1, 2, and 3, sec. 13, T. 27 N., R. 22 E.

September 17, 1889, Julius Larabee filed D. S. No. 2326 for NW. ¼ NE. ¼, E. ½ NE. ¼ sec. 19, and SW. ¼ NW. ¼ sec. 20, T. 27 N., R. 23 E., all in the State of Washington, and notified the register and receiver of the Waterville local land office, said State, to make proper annotations on their records:

Now, therefore, I, Hoke Smith, Secretary of the Interior, in accordance with the provisions of the said agreement, ratified and confirmed by the said act of Congress, and under the said decision of the General Land Office, affirmed by the Department, do hereby set apart for the exclusive use and occupation of said Indians the following-described lands, namely:

For Chelan Bob the NW. ¼, N. ½ SW ¼, and lots 1, 2, and 3 of sec. 20, T. 27 N., R. 23 E., Willamette meridian, containing 337.60 acres;

For Cultus Jim the SE ¼ SE. ¼ of sec. 19, the S. ½ SW. ¼ and lot 4 of sec. 20, and lots 2 and 3 of sec. 29 of the same township and range, containing 209.40 acres; and

For Long Jim the NE. ¼ NE. ¼ SE. ¼, and lot 1 of sec. 11, W. ½ sec. 12, lot 1, of sec. 14, and lots 1 and 2 of sec. 13, T. 27 N., R. 22 E., Willamette meridian, containing 525.30 acres; all in the State of Washington.

HOKE SMITH, *Secretary.*

APRIL 11, 1894.

The departmental order of April 11, 1894, setting aside certain lands under the Moses agreement concluded July 7, 1883, ratified and confirmed by act of Congress approved July 4, 1884 (23 Stats., pp. 79-80), for the exclusive use and benefit respectively of the Indians therein named (Chelan Bob, Cultus Jim, and Long Jim), is hereby modified and changed so as to eliminate from the allotment made to Long Jim the following described lands: The E. ½ of the SW. ¼ and NW. ¼ of the SW. ¼ of sec. 12, T. 27 N., R. 22 E., Willamette meridian, Washington, the said lands being embraced in the entry of Thomas R. Gibson, No. 1586, which said entry remains intact upon the records of the General Land Office under Department decision of September 23, 1893, modifying Department decision of January 6, 1893, so as to omit from affirmance that part of the General Land Office decision dated July 9, 1892, wherein that office suspended the commuted entry of said Gibson, the allotment to said Indian, Long Jim, as corrected, embracing the following described lands: The NE. ¼ of the NE. ¼ of the SE. ¼ and lot 1 of sec. 11, the NW. ¼ and SW. ¼ of the SW. ¼ of sec. 12, lot 1 of sec. 14, and lots 1 and 2 of sec. 13, T. 27 N., R. 22 E., Willamette meridian, Washington.

HOKE SMITH, *Secretary.*

APRIL 20, 1894.

EXECUTIVE MANSION, *January 19, 1895.*

It is hereby ordered that the tract of land embraced in allotment No. 37, located in the State of Washington, made to an Indian named John Salla-Salla, by the Acting Secretary of the Interior, April 12, 1886, under the Moses agreement entered into July 7, 1883, ratified and confirmed by act of Congress approved July 4, 1884 (23 Stats., pp. 79, 80), lying within the following-described boundaries, viz:

"Commencing at the junction of Johnston Creek and the Okanagan (Okinakane) River; thence by Johnston Creek (variation 22° 15′) south 69° 45′ west 40 chains; built monument of stone on the south bank of Johnston Creek Station —; 8° 15′ west 91.54 chains; built monument of basaltic stone, station —; north 69° 45′ east 117.50 chains to the Okanagan (Okinakane) River; set balm stake 4 inches square, 4 feet long, marked Station 3, north 45° 30′ west 86.53 chains to the place of beginning, the mouth of Johnston Creek. Area 630 acres," and set apart by Executive order of May 1, 1886, for the exclusive use and occupation of said allottee, be, and the same is hereby, restored to the public domain, upon the cancellation of said allotment, which is hereby directed.

GROVER CLEVELAND.

WISCONSIN—LAC DU FLAMBEAU RESERVE.

[See ante, p. 931.]

OFFICE SUPERINTENDENT OF INDIAN AFFAIRS,
St. Paul, November 14, 1863.

SIR: I inclose herewith Agent L. E. Webb's report from the surveyors of the Lac du Flambeau and Lac Courte Oreille reservations, together with maps, plats, and field notes of the same.

Very respectfully, your obedient servant,

C. G. WYKOFF, *Clerk.*

HON. WM. P. DOLE,
Commissioner Indian Affairs, Washington, D. C.

[Inclosures.]

OFFICE OF THE LAKE SUPERIOR INDIAN AGENCY,
Bayfield, Wis., May 1, 1863.

SIR: I have to request that you proceed as soon as possible to Lac du Flambeau and make surveys of an Indian reservation, as per article 1 of treaty of September 30, 1854.

You will consult with the Indians and as far as practicable carry out their wishes in the selection of the land. I do not deem it necessary to do anything more than run the exterior lines, and you will mark them thoroughly, so that the Indians can understand the limits of the reservation.

* * * * * * *

Very respectfully, your obedient servant,

L. E. WEBB, *Indian Agent.*

A. C. STUNTZ, Esq.,
Surveyor, Bayfield, Wis.

We, the chiefs of Lac du Flambeaux bands of Chippewa Indians, in council assembled, hereby agree to concentrate our Indians to a reservation the boundaries whereof to be defined and marked by actual survey as pointed out to us this day by A. C. Stuntz, surveyor, through our interpreter, William W. Johnson, whenever the agent of Chippewa Indians of Lake Superior requires it.

We also petition said Indian agent, our father, and through him our Great Father, the President, that the above-named surveyor be allowed to select for us lands joining our reservation to make up the full amount covered by lakes that may come within the boundaries whenever subdivided so as to ascertain the same. We also ask that there may be added to our reservation certain sugar free lands to be selected so that each family living on the reservation can have their sugar works within the boundaries of the reservation which will not be embraced in the present reservation.

This to accompany the respects of the said surveyor.

Signed this 26th day of May, 1863.

AH MOOSE (his x mark).
ASH KAN BAH WISH (his x mark).
KE WISH TE NO (his x mark).

A. C. STUNTZ, *Surveyor.*

In the presence of—
WILLIAM W. JOHNSON.
WILLIAM BRADFORD.

[Notes of survey of Lac du Flambeau Indian Reservation, by A. C. Stuntz, in townships 40 and 41 north, ranges 4, 5, and 6 east of the fourth principal meridian in Wisconsin.]

Commencing at the corner to sections 13, 18, 19, and 24, township 40, between ranges 4 and 5; thence east to corner to sections 13, 18, 19, and 24, between ranges 5 and 6; thence south on range line between ranges 5 and 6 to corner to sections 1, 6, 7, and 12, ranges 5 and 6, township 39; thence east to corner to sections 4, 5, 8, and 9, range 6; thence north to corner to sections 4, 5, 32, and 33, townships 41 and 42 north, range 6 east; thence west on said township line to corner to sections 4, 5, 32, and 33, townships 41 and 42, range 4 east; thence south to a point on fourth correction line 715 links west of corner to sections 32 and 33 (a corner of the reservation); thence east on said correction line to said corner to sections 32 and 33; thence continuing east to corner between sections 2, 3, 34, and 35, townships 40 and 41, range 4 east; thence south to corner to sections 14, 15, 22, and 23, township 40 north, range 4 east (a corner of the reservation); thence east to place of beginning.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., June 26, 1866.

SIR: By the third section of the second article of the treaty, September 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi, provision is made for setting apart and withholding from sale "a tract of land lying about Lac de Flambeau" * * * "equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed by the President." (Stat. L., vol. 10, p. 1109.)

As the lands in the vicinity of this lake are about to be offered at public sale, you are instructed to withdraw and withhold from sale the lands described in the accompanying copy of a communication from the Commissioner of Indian Affairs of the 22d instant, until such time as the boundaries of the reservation contemplated by the treaty are fully defined.

In acknowledging the receipt of this letter you will report your action under these instructions.

Very respectfully, your obedient servant,

W. T. OTTO, *Acting Secretary.*

Hon. J. M. EDMUNDS,
Commissioner of the General Land Office.

Attachment AY

Approval of the Navajo Nation Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act

DECISION DOCUMENT:

APPROVAL OF THE NAVAJO NATION APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT

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I. Introduction and Administrative Record

A. Introduction

Section 303(c) of the Clean Water Act (CWA) requires the States to develop, review and revise (as appropriate) water quality standards for surface waters of the United States. At a minimum, such standards must include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. 40 C.F.R. § 131.6. In addition, Section 401 of the CWA provides that States may grant or deny "certification" for Federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the State's determination regarding whether the proposed activity will comply with, among other things, water quality standards it has adopted under Section 303. If a State denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license.

Section 518(e) of the CWA authorizes EPA to treat an eligible tribe in the same manner as a state (TAS) for certain CWA programs, including Sections 303 and 401. EPA regulations establish the process by which EPA implements that authority and determines whether to approve a tribal application for TAS for purposes of administering Sections 303 and 401 of the CWA. See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 13814 (March 23, 1994) (codified at 40 C.F.R. Part 131).

This Decision Document provides the basis and supporting information for EPA's decision to approve the Application from the Navajo Nation ("the Tribe" or "the Nation") for TAS for Section 303(c) and Section 401 of the CWA, pursuant to Section 518(e) of the CWA and 40 C.F.R. Part 131. CWA Section 518(e)(2) authorizes EPA to treat a tribe as a state for water resources "within the borders of an Indian reservation." This approval applies to all surface waters identified by the Tribe that lie within the exterior borders of the Navajo Indian Reservation, as described in the Application: the Reservation, as established by the Treaty of June 1, 1868 and expanded by subsequent acts of Congress and executive orders that enlarged the Reservation; the satellite reservations of Alamo, Canoncito, and Ramah; and the Tribal trust lands located outside of the formal reservations within the Eastern Agency; it does not include the former Bennett Freeze area. The approval does not cover Morgan Lake, a water body that the Tribe identified in an October 31, 2005 clarification letter as not requested for approval.

B. Administrative Record

The following documents comprise a portion of the administrative record for this decision. Appendix I contains an index to the administrative record for this decision.

1. Application and Supporting Materials

The Tribe's Application for TAS for purposes of the water quality standards and certification programs under Sections 303 and 401 of the CWA includes the following letters and related documents from the Tribe and its Counsel:

11/22/99 Letter from Kelsey A. Begaye, President of the Navajo Nation to Felicia A. Marcus, EPA Region 9 Regional Administrator enclosing CWA Section 303 "Eligibility Application"

4/21/00 Letter from Jill Grant, Esq., Nordhaus, Haltom, Taylor, Taradash and Frye, LLP to Patrick Antonio, Navajo Nation Water Quality Program

11/27/00 Letter from Patrick Antonio, Hydrologist, Navajo Nation Environmental Protection Agency to Wendell Smith, EPA Region 9 enclosing map for revised eligibility determination

12/10/00 Letter from Julia A. Jones of Dorsey and Whitney LLP to Wendell Smith, EPA Region 9 re: Notice of Proposed Action on Navajo Nation TAS Application for CWA Section 303

8/07/01 Letter from Kelsey A. Begaye, President of the Navajo Nation to Alexis Strauss, Director, EPA Region 9 Water Division enclosing revised TAS Application

8/08/01 Letter from Patrick Antonio, Navajo EPA to Wendell Smith, EPA Region 9 enclosing copies of revised TAS Application

4/19/02 Note from Patrick Antonio, Navajo EPA to Wendell Smith EPA Region 9, attaching October 10, 2001 letter from Derrick Watchman Moore, Executive Director, Navajo EPA to Alexis Strauss and October 5, 2001 statement regarding Tribal jurisdiction from Navajo Nation Attorney General Levon Henry

11/15/02 Letter from Calvert L. Curley, Acting Executive Director of the Navajo EPA to EPA Region 9 Regional Administrator Wayne Nastri

1/09/03 Letter from Arlene Luther, Acting Executive Director of Navajo EPA to Wayne Nastri, EPA Region 9 Regional Administrator regarding Navajo Eligibility Application—Petition for Federal Water Quality Standards

1/21/03 Letter from Arlene Luther, Navajo EPA to Wayne Nastri, EPA Region 9 Regional Administrator Regarding Navajo TAS Application—Additional Information Regarding Impacts of Nonmember Activities on Health, Welfare, Political Integrity, and Economic Security of Navajo Nation and its Members

6/09/03 Letter from Arlene Luther, Navajo EPA to Wayne Nastri, EPA Region 9 Regional Administrator

6/27/03 E-mail and Fax from Deb Misra, Navajo Nation EPA to Wendell Smith, EPA Region 9

12/15/03 Fax from Deb Misra, Navajo EPA, to Wendell Smith, EPA Region 9 regarding Mr. Misra's Professional Qualifications

12/15/03 Fax from Patrick Antonio, Navajo EPA to Wendell Smith, EPA Region 9 containing copies of previous e-mails between Antonio and Smith on 7/18 and 7/23

12/15/03 Fax from Edith Snyder, Navajo EPA to Wendell Smith, EPA Region 9 attaching resume of Navajo EPA Executive Director Stephen Brian Etsitty

10/31/05 Letter from Steve Etsitty, Navajo EPA, to Wayne Nastri, EPA Regional Administrator clarifying that the Tribe's Application does not cover Morgan Lake, the only listed Tribal water within the lease area for the Four Corners Power Plant

2. Letters and Related Documents from EPA

12/28/00 Letter from Felicia Marcus, Regional Administrator, EPA Region 9 to appropriate governmental entities notifying them of the substance and basis of Navajo Nation's jurisdictional assertions regarding its TAS Application.

2/16/01 Letter from Laura Yoshii, Acting Regional Administrator, EPA Region 9 to Peter Maggiore, Secretary of State of New Mexico Environment Dept. with cc's to listed governmental entities

3/21/01 Letter from Wendell Smith, EPA Region 9 to Patrick Antonio, Navajo EPA

6/07/01 Letter from Laura Yoshii, Acting Regional Administrator, EPA Region 9 to Jacqueline Shafer, Director of Arizona Department of Environmental Quality

4/08/02 Letter from Wayne Nastri, Regional Administrator, EPA Region 9 to appropriate governmental entities notifying them of the substance and basis of jurisdictional assertions in amended TAS Application

5/23/02 Letter from Wayne Nastri, Regional Administrator, EPA Region 9 to Gary Johnson, Governor, State of New Mexico

7/01/02 Letter from Alexis Strauss, EPA Region 9 to Paul Ritzma, New Mexico Environment Department General Counsel, with cc's to listed governmental entities

11/08/02 Letter and enclosure from Wendell Smith, Manager, EPA Region 9 Water Quality Programs to Patrick Antonio, Navajo EPA

3/04/02 Letter from Catherine Kuhlman, EPA Region 9 Acting Water Division Director to Arlene Luther, Navajo EPA

5/02/03 Fax Transmittal with attachment from Wendell Smith, EPA Region 9 to Thomas Sayre Llewellyn, Esq., Washington, DC representing Arizona Public Service Company.

7/23/03 Letter from Wayne Nastri, Regional Administrator, EPA Region 9 to Tracy Hughes, General Counsel of the State of New Mexico

7/31/03 Letter from Wayne Nastri, Regional Administrator, EPA Region 9 to Stephen B. Etsitty, Director of the Navajo Nation EPA

8/29/03 Letter from Alexis Strauss, EPA Region 9 Water Division Director to Deborah Seligman, Director, Governmental Affairs of New Mexico Oil and Gas Association

9/15/05 Letter from EPA Region 9 Regional Administrator Wayne Nastri transmitting Proposed Findings of Fact to appropriate governmental entities for comment

11/16/05 Memorandum from Wendell Smith, EPA Region 9 Water Programs Manager regarding Region's Assessment of Navajo Nation's Capability for CWA TAS Application

3. Governmental Entity Comments Regarding Tribal Authority

As already noted, former EPA Region 9 Regional Administrator Felicia Marcus sent a letter dated December 28, 2000, notifying appropriate governmental entities[1] of the substance and basis of the Tribe's assertion of authority in its original Application as provided at 40 C.F.R. § 131.8(c)(2). Notice went to the governors of states adjacent to the Navajo Nation: Arizona, New Mexico, Utah, and Colorado; to Tribes with reservations adjacent to the Navajo Nation; and to various federal agencies. EPA extended the comment period to March 2, 2001.

On August 8, 2001, the Navajo Nation amended its Application. As a result, on April 8, 2002, EPA again notified appropriate governmental entities of the substance and basis of the Tribe's assertion of authority in the Amended Application. In addition to that notice, EPA also placed announcements in local newspapers to notify interested parties, including local governments, who could comment to EPA through the apprppriate governmental entities. Notice of the Amended Application was sent to the following recipients:

The Honorable Evelyn James, President
San Juan Southern Paiute Tribe
P.O. Box 2656
Tuba City, AZ 86404

The Honorable Wayne Taylor, Jr, Chairman
The Hopi Tribe
P.O. Box 123
Kykotsmovi, AZ 86039

The Honorable Jane Hull, Governor
State of Arizona
1700 W. Washington St.
Phoenix, AZ 85007

The Honorable Michael O. Leavitt,
Governor
State of Utah
Salt Lake City, Utah 84114

The Honorable Gary Johnson, Governor
State of New Mexico
State Capitol Building, 4th Floor
Santa Fe, NM 87503

The Honorable Claudia Vigil Muniz,
President
Jicarilla Apache Tribe
P.O. Box 507
Dulce, NM 87259

The Honorable Malcom B. Bowekaty,
Governor
Pueblo of Zuni
Zuni, NM 87327

The Honorable Bill Owens, Governor
State of Colorado
136 State Capitol
Denver, CO 80203

[1] EPA defines "appropriate governmental entities" to consist of "States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State." 56 Fed. Reg. at 64884. EPA also received comments from non-governmental entities. Those and all other comments are discussed in Appendix III.

The Honorable Harry Early, Governor
Pueblo of Laguna
P.O. Box 194
Laguna, NM

The Honorable Ernest House, Chairman
Ute Mountain Tribe
P.O. Box 248
Towac, CO 81334

EPA also notified environmental officials of some of the Tribes and States, and officials of various federal entities, including the following: U.S. Park Service, U.S. Bureau of Reclamation, U.S. Bureau of Indian Affairs, U.S. Army Corps of Engineers, and U.S. Bureau of Land Management.

EPA received comments from the following state, tribal, and federal entities that either supported approval of the Tribe's Application or raised no competing or conflicting jurisdictional claims: Arizona, Utah, the Pueblo of Zuni, the Pueblo of Laguna, and the Bureau of Land Management. The only other commenting governmental entity, the State of New Mexico, asserted that the Tribe lacked authority over certain non-trust lands in New Mexico outside the boundaries of the formal Reservation as described in the Application and used in this Decision Document. On January 9, 2003, the Tribe sent EPA a letter captioned as a petition for Federal Water Quality Standards that withdrew the Tribe's assertion of authority over those non-trust lands. On June 27, 2003, New Mexico sent EPA a letter revising the State's previous comments and expressing support for the Tribe's Application, but reiterating its objections to the Tribe's claims to jurisdiction over surface waters not within the formal Reservation or on Trust land. In light of the Tribe's previous letter, the State's comment about the Tribe's assertion of authority is moot because it refers to areas that are not part of the Tribe's Application and, thus, are not covered by EPA's approval in this Decision Document. Finally, on October 31, 2005, the Tribe sent EPA an additional letter clarifying that it did not wish EPA to address Morgan Lake.

Consistent with its practice, EPA prepared proposed Findings of Fact relating to the Tribe's narrowed jurisdictional claim and, on September 15, 2005, it circulated them for comment to the affected governmental entities that had received notice of the Tribe's jurisdictional assertions. EPA received no comments from those governmental entities on the proposed findings.[2] EPA has adopted the proposed Findings of Fact, which as modified in final form, are contained in Appendix II.

[2] The only comment in response to the Proposed Findings of Fact was from the Arizona Public Service Company (APS), which operates a facility on Tribal land leased from the Tribe; APS also commented on the two previous notifications, and all of its comments are addressed in the Response to Comments attached as Appendix III.

4. Capability Review

By memorandum dated November 16, 2005, Wendell Smith, EPA Region 9, State, Tribal, and Municipal Programs Office, reviewed the capability of the Tribe to administer the water quality standards and certifications programs and, as explained below, determined that the Tribe has adequate capability.

5. Statutory and Regulatory Provisions

a. Section 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e), authorizes EPA to treat an eligible Indian tribe in the same manner as a state if it meets specified eligibility criteria.

b. "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations," 56 Fed. Reg. 64876 (codified at 40 C.F.R. Part 131), establish the requirements for a Tribe to obtain TAS approval.

6. Policy Statements

a. EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 11, 1984, as reaffirmed most recently by EPA Administrator Johnson on September 26, 2005.

b. EPA Memorandum entitled "EPA/State/Tribal Relations," by EPA Administrator Reilly, July 10, 1991.

c. Memorandum entitled "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," by Robert Perciasepe and Jonathan Cannon, March 19, 1998.

II. Requirements for TAS Approval

Under CWA Section 518(e) and EPA's implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve a tribe's TAS application for water quality standards under Section 303(c) and certification under Section 401. These are: (1) the Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation; (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources that are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality

standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

EPA's regulation at 40 C.F.R. § 131.8(b) identifies what must be included in an application by an Indian tribe for TAS to administer a water quality standards program. EPA separately reviews tribal water quality standards under 40 C.F.R. § 131.21, and TAS approval under 40 C.F.R. § 131.8 does not constitute an approval of such standards. But approval of a tribe for TAS for purposes of water quality standards does authorize that tribe to issue certifications under Section 401 of the CWA, see 40 C.F.R. § 131.4(c), provided that the tribe designates a "certifying agency" as defined in 40 C.F.R. § 121.1(e).

A. Federal Recognition

EPA can approve a TAS application for water quality standards under Section 303 and certification under Section 401 only from an "Indian tribe" that meets the definitions set forth in CWA Section 518(h) and 40 C.F.R. § 131.3(k) and (l). See 40 C.F.R. § 131.8(a)(1). The term "Indian tribe" is defined as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." CWA § 518(h)(2), 40 C.F.R. § 131.3(l). The term "Federal Indian Reservation" means "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." CWA § 518(h)(1), 40 C.F.R. § 131.3(k).

The Navajo Nation, Arizona, New Mexico, and Utah, is included on the Secretary of the Interior's list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." 68 Fed. Reg. 68180, 68182 (December 5, 2003). Furthermore, as discussed below, the Tribe is exercising governmental authority over a reservation within the meaning of the CWA. Thus, EPA has determined that the Tribe meets the requirements of 40 C.F.R. § 131.8(a)(l).

B. Substantial Governmental Duties and Powers

To show that it has a governing body currently carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that the tribe submit a descriptive statement that should: (i) describe the form of the tribal Government; (ii) describe the types of governmental functions currently performed by the tribal governing body; and (iii) identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

The Tribe's Application relies on EPA's previous approval of the Tribe's TAS application for CWA Section 106, noting that when EPA approved that application, it found the Tribe had adequately described the form of tribal government, the governmental functions the government performs, and the source of Tribal authority to carry out those functions. A tribe

that has previously shown that it meets the "governmental functions" requirement for purposes of another EPA program need not make that showing again. *See* 59 Fed. Reg. 64339, 64340 (December 14, 1994) (regulation simplifying TAS process). EPA's review and approval of the Section 106 Application described the basis for its determination that the statement supporting the Section 106 Application established that the Tribe meets the "governmental functions" requirements as follows:

> According to that statement, the Navajo Nation has a large and elaborate tripartite government, with executive, legislative, and judicial branches. The Application also describes numerous governmental functions which the Tribe performs. One of the primary functions specified by the Tribe is the use of its police powers to protect the health, safety, and welfare of the Navajo people. The Application also indicates that the Nation possesses eminent domain authority, criminal enforcement authority, and the power to tax both individuals and corporations.

EPA has determined that the Tribe's submissions in its Application and supplemental information, including the prior TAS approval in 1993 adequately demonstrate that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area and that nothing has happened in the interim to change that determination. Thus, the Tribe meets the requirements in 40 C.F.R. § 131.8(b)(2).

C. Jurisdiction Over "Waters Within the Borders" of the Navajo Indian Reservation

Under 40 C.F.R. § 131.8(b)(3), the Tribe is required to submit a statement of its authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the tribe asserts authority over surface water quality; (ii) a statement by the Tribe's legal counsel (or equivalent official) that describes the basis for the Tribe's assertion of authority, which may include a copy of documents such as tribal Constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority; and (iii) an identification of the surface waters for which the tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

1. Map or Legal Description

The Tribe has submitted maps and a legal description of the Reservation, which consists of 17,585,494 acres of land in Arizona, New Mexico, and Utah. Appendix II describes the Reservation as follows:

> The Navajo Nation's Reservation is the largest Indian reservation in the United States, including 17,585,494 acres within its reservation boundaries as established by the Treaty of June 1, 1868 and expanded by subsequent executive orders. The original Application submitted by the Nation included

all lands in the formal Reservation and the Eastern Agency area in New Mexico, with a few exceptions. The Nation subsequently narrowed the scope of the Application to lands in the formal Navajo Reservation, including the satellite reservations, and Tribal trust lands in the Eastern Agency, but excluding all Eastern Agency lands other than Tribal trust lands and excluding Morgan Lake, the only Tribally identified surface water located on certain lands the Tribe leases to Arizona Public Service Company.

In sum, the Application covers all lands within the formal Reservation excluding the former Bennett Freeze area: the three satellite reservations of Alamo, Canoncito and Ramah, and all tribal trust lands in the Eastern Agency.[3] As explained below, it effectively does not include land the Tribe leases for the Four Corners Power Plant and Navajo Generating Station.

EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing a map and a legal description of the area over which the Tribe asserts authority to regulate surface water quality.

2. Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards

The Tribe's Application, as clarified in the Tribe's October 31, 2005 letter, asserts authority over all surface waters identified by the Tribe within the Reservation except for Morgan Lake. The Tribe has submitted a Map attached to its Application as Exhibit C that shows the Reservation waters. The Tribe has also submitted water quality standards that identify those Reservation waters for which it proposes to establish standards. The list of covered waters is attached as Appendix IV. Without conceding authority, the Tribe in its October 31, 2005 clarification letter expressly asked that EPA not make a finding regarding Tribal authority over Morgan Lake, which is a manmade cooling pond that is the only listed Tribal water within the areas leased by the Tribe for the Four Corners Power Plant and Navajo Generating Station.[4] EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by identifying the surface waters over which it proposes to establish water quality standards.

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[3] EPA has consistently interpreted the term "reservation" under CWA § 518(e) as allowing for the inclusion of trust lands set apart for the use of a tribe, even if the lands have not been formally designated as reservations. *See e.g.* 56 Fed. Reg. 64876, 64881 (December 12, 1991).

[4] In approving the Tribe's Application, EPA is not making any findings about the Tribe's authority over Morgan Lake or the Four Corners Power Plant and Navajo Generating Station or their owners and operators. EPA also is deferring the issue of whether the Tribe's water quality standards, if and when approved by EPA, would apply to any CWA-permitted discharges from these facilities to Tribal waters. To the extent necessary, EPA will consider these issues, and how they relate to the lease provisions, in the context of future permitting or other relevant action taken by EPA.

3. Statement Describing Basis for the Tribe's Authority

Finally, the Application identifies the legal authorities under which the Tribe performs its governmental functions. These authorities include the provisions of the Navajo Tribal Code, and various resolutions that have been enacted by the Tribal Council and its Committees. As indicated in the Tribe's Section 106 Application, many of these authorities were previously provided to EPA (as part of the Navajo TAS application to develop a Public Water System Supervision (PWSS) program under the Safe Drinking Water Act).

4. Authority over Reservation Waters

CWA Section 518(e)(2) authorizes EPA to treat a tribe as a state for water resources "within the borders of an Indian reservation." EPA has interpreted this provision to require that a tribe show inherent authority over the water resources for which it seeks TAS approval. 56 Fed. Reg. at 64880. The Nation has asserted that it has authority to set water quality standards and issue certifications for all surface waters that it has identified within the Reservation boundaries as described in the Application and clarifying letter. As explained in the analysis below, including the analysis of the information in the Findings of Fact in Appendix II, EPA has determined that the Navajo Nation has shown inherent authority over nonmember activities for purposes of the CWA water quality standards and water quality certification programs.

EPA analyzes a tribe's water quality authority under the CWA over activities of nonmembers on nonmember-owned fee lands under the test established in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana* test). In *Montana*, the Supreme Court held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over nonmember activities on nonmember fee land. However, the Court also found that Indian tribes retain inherent sovereign power to exercise civil jurisdiction over nonmember activities on nonmember-owned fee lands within the reservation where (i) nonmembers enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (ii) ". . . [nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. In analyzing tribal assertions of inherent authority over nonmember activities on fee lands on Indian reservations, the Supreme Court has reiterated that the *Montana* test remains the relevant standard. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (describing *Montana* as "the pathmarking case concerning tribal civil authority over nonmembers"); *see also Nevada v. Hicks*, 533 U.S. 353, 358 (2001) ("Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in [*Montana*]").

In the preamble to EPA's 1991 water quality standards regulation, the Agency noted that, in applying the *Montana* test and assessing the impacts of nonmember activities on fee lands on an Indian tribe, EPA will rely upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 Fed. Reg. at 64878-79. EPA also recognized that the analysis of whether the *Montana* test is met in a particular situation

necessarily depends on the specific circumstances presented by the tribe's application. *Id.* at 64878. In addition, in that rulemaking, EPA noted as a general matter "that activities which affect surface water and critical habitat quality may have serious and substantial impacts" and that, "because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations . . . any impairment that occurs on, or as a result of, activities on non-Indian fee lands [is] very likely to impair the water and critical habitat quality of the tribal lands." *Id.* EPA also noted that water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government. *Id.* at 64879.

The Clean Water Act addresses the maintenance and restoration of the physical, chemical, and biological integrity of waters of the United States, including tribal waters, by providing that tribes treated in the same manner as states, act to "prevent, reduce, and eliminate pollution." CWA Section 101(b). CWA Section 518 authorizes tribes to carry out CWA functions that "pertain to the management and protection" of reservation water resources. The *Montana* test analyzes whether the tribe is proposing to regulate activity that "threatens" or "has some direct effect" on tribal political integrity, economic security, or health or welfare. That test does not require a tribe to demonstrate to EPA that nonmember activity "'is actually polluting tribal waters,'" if the tribe shows "'a potential for such pollution in the future.'" *Montana v. EPA,* 141 F.Supp.2d 1249, 1262 (D. Mont. 1998), quoting *Montana v. EPA,* 941 F.Supp. 945, 952 (D. Mont. 1996), *aff'd* 137 F.3d 1135 (9th Cir. 1998), *cert denied* 525 U.S. 921 (1998). Thus, EPA considers both actual and potential nonmember activities in analyzing whether a tribe has authority over nonmember activities under the Clean Water Act.[5]

EPA recognizes that under well-established principles of federal Indian Law, a tribe retains attributes of sovereignty over both its lands and its members. *See e.g. California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 (1987); *U.S. v. Mazurie,* 419 U.S. 544, 557 (1975). Further, tribes retain the "inherent authority necessary to self-government and territorial management" and there is a significant territorial component to tribal power. *Merrion v. Jicarilla Apache Tribe,* 450 U.S. 130, 141-142. *See also White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 151 (1980) (significant geographic component to tribal sovereignty).

And a tribe also retains its well-established power to exclude non-members from tribal land, including "the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion,* 455 U.S. at 144. Thus, a tribe can regulate the conduct of

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[5] EPA has not resolved whether it is necessary to analyze under the *Montana* test the impacts of nonmember activities on tribal/trust lands, such as those covered in this Application, to find that a tribe has inherent authority to set water quality standards for such areas. EPA believes, however, that, as explained in this Decision Document, the Tribe could show authority over nonmember activities on tribal/trust lands covered by the Application under the *Montana* "impacts" test.

persons over whom it could "'assert a landowner's right to occupy and exclude.'" *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 651-652 (2001), quoting *Strate,* 520 U.S. at 456.

The Tribe's Application makes the following claims about the importance of Tribal water quality to the Tribe:

> These waters are used by the [T]ribe and by individual members for crop irrigation, livestock and wildlife watering, fishing, ceremonial and religious uses, and in some instances domestic uses. Any impairment of these waters would therefore have a serious and substantial impact on the health, safety and welfare of the Navajo Nation and its members. Moreover, because of the scattered nature of the nonmember-owned fee lands within the Reservation, as shown on the maps attached as Exhibits C and G, any impairment of water quality on those lands can not help but have an effect on the water quality of neighboring [T]ribal lands inhabited by [T]ribal members. This interrelationship means that the Navajo Nation must be able to regulate water quality on these lands in order to exercise self-governance and ensure that its members and other residents of the Navajo Nation will have the clean water necessary to their health, safety, and welfare. The Navajo Nation's regulation of water quality throughout Navajo Indian country is thus integral to the protection of the health and welfare of the Navajo Nation, as well as to the political integrity of the Navajo Nation as a government, and therefore meets the *Montana* test.

As explained more fully below and in Appendix II, the Tribe supported its claims with evidence that it uses the waters as it asserts and with information showing how current and potential nonmember activities on the Reservation have or may have direct effects on the Tribe's political integrity, economic security, and health and welfare.

The facts upon which EPA has relied in reviewing and making findings regarding the Tribe's assertion of authority to regulate the activities of nonmembers on the Reservation are presented in the Application, supplemental materials, and Appendix II to this Decision Document. EPA also bases its findings and conclusions on its special expertise and practical experience regarding impacts to water quality and the importance of water quality management, recognizing that clean water may be crucial to the survival of the Tribe and its members. As explained more fully in Appendix II, EPA makes several findings, including the following:

EPA finds that the Tribe has shown that the uses the Tribe makes of the waters include domestic, ceremonial, and religious uses, crop irrigation, livestock and wildlife watering, fishing, and recreation in and on the water; that each of those uses is important to the Tribe and that regulating water quality is important to protecting the uses. EPA has further found that the Reservation's characteristics are such that various human activities occur or may occur, including septic system operation, energy production, forestry, and agriculture and livestock

raising, including pesticide and herbicide use; and that those activities, if not properly regulated, can seriously affect the Tribe.

EPA also cites and relies on specific examples of nonmember presence and activities on the Reservation including those from private residences and commercial businesses. For example, Appendix II describes actual or potential water quality impacts from the following: residential septic tanks, sand and gravel operations, a concrete plant, a hospital, rangeland, a recreational vehicle park, a motel and a trading post. There are also substantial nonmember mineral extraction activities within the Reservation, including a mining complex located partially within the Reservation with an annual production of 12 million tons and a total of 110 sedimentation ponds, and a surface coal mining operation that has 18 outfalls. Actual or potential impacts from those nonmember activities include untreated sewage from faulty septic systems or overflowing sewage lagoon systems; excessive sediment transport from livestock overgrazing or leaking water wells; storm runoff or discharges from mining facilities, industrial facilities or construction sites, and coal slurry line releases. Those impacts have the potential to seriously affect the Tribe.

Based on the preceding findings, and additional findings and information, all described more fully in Appendix II, EPA concludes that existing and potential future nonmember activities within the Reservation have or may have direct effects on the political integrity, economic security and health or welfare of the Tribe that are serious and substantial.

Thus, the Agency has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(ii) by providing a statement by the Tribe's legal counsel that describes the basis for the Tribe's assertion of authority over surface waters within the borders of the Reservation. And that determination, in conjunction with the previously stated findings, means that the Tribe has met the requirement set forth at 40 C.F.R. § 131.8(a)(3).

D. Capability

To demonstrate that a tribe has the capability to administer an effective water quality standards program, 40 C.F.R. § 131.8(b)(4) requires that the tribe's application include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations; (iii) a description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government; (iv) a description of the existing, or proposed, agency of the tribe that will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards; and (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective water quality

standards program or a plan that proposes how the tribe will acquire additional administrative and technical expertise. 40 C.F.R. § 131.8(b)(4)(i)-(v).

The Tribe's Application shows that it is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the CWA and applicable regulations. The record includes a November 16, 2005 memorandum prepared by Wendell Smith, EPA Region 9, State, Tribal, and Municipal Programs Office, that explains the reasons for finding that the Tribe is capable of administering its water quality standards program. Mr. Smith concluded that the Tribe has demonstrated the capability to administer an effective water quality standards program based on his review of the Application and other documents. He notes that the Tribe has extensive prior involvement in a number of environmental and public health programs. He reports that the Application states that the Navajo Nation Environmental Protection Agency (NNEPA) is an independent agency within the Nation's Executive Branch and that it will have primary responsibility for developing and revising water quality standards and certifying permits. NNEPA is well-funded and has a fourteen-person staff whose resumes indicate that the NNEPA possesses the administrative and technical capabilities to administer the water quality standards program.

The Tribe has satisfied the requirements of 40 C.F.R. § 131.8(b)(4) by providing information that describes its capability to administer an effective water quality standards and certification program, and EPA has determined that the Tribe has met the requirements of 40 C.F.R. § 131.8(a)(4).

III. Conclusion

EPA has determined that the Navajo Tribe has met the requirements of CWA Section 518(e) and 40 C.F.R. § 131.8, and therefore approves the Tribe's Application for TAS to administer the water quality standards program pursuant to CWA Sections 518(e) and 303(c). Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for the purposes of certifications under CWA Section 401.

Wayne Nastri
Regional Administrator

Date 1/20/06

APPENDIX I

INDEX TO THE ADMINISTRATIVE RECORD

CERTIFIED INDEX
TO
THE ADMINISTRATIVE RECORD

with respect to
the

Navajo Nation's Program Authorization Application

for
the Clean Water Act's Section 303 - Water Quality Standards
and
Section 401 - Certification Programs

On behalf of the United States Environmental Protection Agency ("EPA"), I hereby certify that the materials listed in the attached index described as the administrative record constitute the complete administrative record for EPA's approval of the Navajo Nation's Program Authorization Application under the Clean Water Act's Section 303 - Water Quality Standards and Section 401 Certification Programs.

In witness whereof I have hereunto subscribed my name this 20th day of January, 2006, at San Francisco, California.

Alexis Strauss
Director, Water Division, EPA Region 9

ADMINISTRATIVE RECORD INDEX

Document #	Description	Date of Document
Vol.1/Doc.1.	Letter from Peterson Zah, President of the Navajo Nation, to Daniel W. McGovern, Regional Administrator of U.S. EPA Region 9 enclosing the application for treatment as a State under Section 106 of the Clean Water Act	07/07/1992
2.	Memorandum from Nancy J. Marvel, Regional Counsel of U.S. EPA Region 9, to Harry Seraydarian, U.S. EPA Region 9 Water Management Division Director, which determined that the Navajo Nation had satisfied the requirements for treatment as a State under the Clean Water Act's Section 106	06/30/1993
3.	Letter from John C. Wise, Acting Regional Administrator of U.S. EPA Region 9, to the Honorable Peterson Zah, President of the Navajo Nation, announcing EPA's approval of the Navajo Nation's application for treatment as a State with respect to the Water Pollution Control Program under the Clean Water Act's Section 106	06/30/1993
Vol.2/Doc.4.	Letter from Kelsey A. Begaye, President of the Navajo Nation, to Felicia Marcus, Regional Administrator of U.S. EPA Region 9, enclosing copies of the "Eligibility Application" under Section 303 of the Clean Water Act	11/22/1999
Vol.3/Doc.5.	Letter from Nordhaus, Haltom, Taylor, Taradash & Frye, LLP to Patrick Antonio, Water Quality Programs, Navajo Nation EPA	04/21/2000

6.	Letter and enclosures from Patrick Antonio, Hydrologist, Navajo Nation Environmental Protection Agency, to Wendell Smith of U.S. U.S. EPA Region 9, enclosing copies of the map for the revised Eligibility Application under Sections 303 and 401 of the Clean Water Act	11/27/2000
7.	Letter from Julia A. Jones of Dorsey and Whitney LLP to Wendell Smith of the U.S. Environmental Protection Agency, Region 9 Re: Notice of Proposed Action on the Navajo Nation Treatment as a State (TAS) Application for Section 303 of the Clean Water Act	12/01/2000
8.	Letter from Felicia Marcus, Regional Administrator of EPA Region 9, to appropriate governmental entities notifying them of the substance of and basis for the Navajo Nation's jurisdictional assertion with respect to the subject application	12/28/2000
9.	Letter from Eleanor S. Towns, Regional Forester, Forest Service, United States Department of Agriculture to Felicia Marcus, Regional Administrator of U.S. EPA Region 9	01/16/2001
10.	Letter from M.J. Chavez, State Director, U.S. Department of the Interior, Bureau of Land Management, to Felicia Marcus, Regional Administrator of U.S. EPA Region 9	01/26/2001
11.	Letter from Peter Maggiore, Secretary of the State of New Mexico's Environment Department to Laura Yoshii, Acting Regional Administrator of U.S. EPA Region 9	01/31/2001
12.	Letter and enclosure from Thomas Sayre Llwellyn, of the Law Offices of Thomas Sayre Llwellyn, to EPA Region 9's Wendell Smith. The enclosure contained the comments of the Arizona Public Service Company	02/09/2001
13.	Letter from Malcolm B. Bowekaty, Governor, Pueblo of Zuni, to the U.S. EPA Region 9	02/13/2001

Vol.4/Doc.14.	Letter from Laura Yoshii, Acting Regional Administrator of U.S. EPA Region 9, to Peter Maggiore, Secretary of the State of New Mexico's Environment Department with cc's to the list of governmental entities.	02/16/2001
15.	Letter from EPA Region 9's R.Wendell Smith to Patrick Antonio, Hydrologist, Navajo Nation EPA	03/21/2001
16.	Letter from Jacqueline E. Schafer, Director of the State of Arizona's Department of Environmental Quality to Laura Yoshii, Acting Regional Administrator of U.S. EPA Region 9	03/28/2001
17.	Letter from Laura Yoshii, Acting Regional Administrator of U.S. EPA Region 9to Jacqueline Shafer, Director of Arizona's Department of Environmental Quality	06/07/2001
18.	Letter from Kelsey A. Begaye, President of the Navajo Nation, to Alexis Strauss, Director of U.S. EPA Region 9's Water Division enclosing copies of the Revised Eligibility Application under Sections 303 and 401 of the Clean Water Act	08/07/2001
19.	Letter from Patrick Antonio, Hydrologist, Navajo Nation Environmental Protection Agency, to Wendell Smith of U.S. U.S. EPA Region 9 enclosing copies of the Revised Eligibility Application under Sections 303 and 401 of the Clean Water Act	08/08/2001
20.	Letter from Wayne Nastri, Regional Administrator of U.S. EPA Region 9 to appropriate governmental entities notifying them of the substance of and basis for the jurisdictional assertion with respect to the amended application	04/08/2002
Vol.5/Doc.21.	Note from Patrick Antonio to Wendell Smith attaching the October 10, 2001 letter from Derrith Watchman Moore, Executive Director of the Navajo Nation EPA, to Alexis Strauss, Director of U.S. EPA Region 9's Water Division	04/19/2002

22.	Letter and enclosure from Jacqueline Schafer, Director of Arizona's Department of Environmental Quality to EPA Region 9's Wendell Smith	04/30/2002
23.	Letter from Malcolm B. Bowekaty, Governor of the Pueblo of Zuni to Wendell Smith of EPA Region 9	05/03/2002
24.	Letter from Kitty L. Roberts, Superintendent of the National Park Service, U.S. Department of the Interior to Wendell Smith of U.S. EPA Region 9	05/07/2002
25.	Letter from Michael O. Leavitt, Governor of the State of Utah to Wendell Smith of U.S. EPA Region 9	05/13/2002
26.	Letter from Denise P. Meridith, State Director of the Bureau of Land Management, U.S. Department of the Interior to Wendell Smith of EPA Region 9	05/15/2002
27.	Letter from Harry D. Early, Governor, Pueblo of Laguna to U.S. EPA Region 9	05/20/2002
28.	Letter from Wayne Nastri, Regional Administrator of U.S. EPA Region 9 to Gary Johnson, Governor of the State of New Mexico	05/23/2002
29.	Letter from Michael A. Taylor, Acting State Director Bureau of Land Management, U.S. Department of the Interior to Jacqueline E. Schafer, Director of the State of Arizona's Department of Environmental Quality	06/19/2002
30.	Letter from Paul R. Ritzma, General Counsel of the State of New Mexico's Environment Department to EPA Region 9's Wendell Smith	06/21/2002
31.	Letter from Thomas Sayre Llewellyn of the Law Offices of Thomas Sayre Llewellyn to EPA Region 9's Wendell Smith enclosing the comments of the Arizona Public Service Company	06/24/2002

32.	Letter from Alexis Strauss, Director of the Water Division of U.S. EPA Region 9 to Paul Ritzma, General Counsel of the State of New Mexico's Environment Department with cc's to the list of governmental entities	07/01/2002
33.	Letter from William C. Scott of Modrall Sperling Lawyers to EPA Region 9's Wendell Smith	08/29/2002
34.	Letter from William C. Scott to Paul Ritzma, General Counsel of the State of New Mexico's Environment Department	08/29/2002
35.	Letter from Matthew J. Bruff of Law and Resource Planning Associates to U.S. EPA Region 9's Wendell Smith	08/29/2002
36.	Letter from Paul R. Ritzma, General Counsel of the State of New Mexico's Environment Department which enclosed comments from the 08/29/2002 Utilities Division of the City of Gallup, & the New Mexico Oil and Gas Association	08/29/2002
37.	Letter from Paul R. Ritzma, General Counsel of the State of New Mexico's Environment Department U.S. EPA Region 9's Wendell Smith which enclosed the 08/29/2002 comments from the New Mexico Oil and Gas Association	08/30/2002
38.	Letter and enclosure from William C. Scott of Modrall Sperling Lawyers to EPA Region 9's Wendell Smith	08/30/2002
39.	Letter and enclosure from Jim Dunlap, Vice Chairman of the San Juan Water Commission to EPA Region 9's Wendell Smith	08/30/2002
40.	Letter from Caren Cowan, Executive Director of the New Mexico Cattle Growers' Association to U.S.EPA Region 9's Wendell Smith	08/30/2002
41.	Letter from Callie Gnatkowski, Executive Director of the New Mexico Wool Grower's, Inc. to U.S. EPA Region 9's Wendell Smith	08/30/2002

42.	Letter from Ronnie P. Hawks of Salmon, Lewis & Weldon, P.L.C. Attorneys at Law to EPA Region 9's Wendell Smith	09/23/2002
43.	Letter and enclosure from EPA Region 9's Wendell Smith, Manager, Water Quality Programs to Patrick Antonio, Hydrologist of the Navajo Nation EPA	11/08/2002
44.	Letter from Calvert L. Curley, Acting Executive Director of the Navajo Nation EPA to Wayne Nastri, Regional Administrator of U.S. EPA Region 9	11/15/2002
45.	Letter from Arlene Luther, Acting Executive Director of the Navajo Nation EPA to Wayne Nastri, Regional Administrator of U.S. EPA Region 9, regarding the Navajo Nation's Eligibility Application - Petition for Federal Water Quality Standards	01/09/2003
46.	Letter from Arlene Luther, Acting Executive Director of the Navajo Nation EPA, to Wayne Nastri, Regional Administrator of U.S. EPA, regarding the Navajo Nation Clean Water Act Eligibility Application - Additional Information Regarding Impacts of Non-member Activities on the Health, Welfare, Political Integrity and Economic Security of the Navajo Nation and its Members	01/21/2003
47.	Letter from Catherine Kuhlman, Acting Water Division Director of EPA Region 9 to Arlene Luther, Acting Executive Director of the Navajo Nation EPA	03/04/2003
48.	FAX Transmittal with attachment from Wendell Smith of U.S. EPA Region 9 to Thomas Sayre Llwellyn of the Law Offices of Thomas Sayre Llwellyn	05/02/2003
49.	Letter from Arlene Luther, Acting Executive Director of the Navajo Nation EPA to Wayne Nastri, Regional Administrator of U.S. EPA Region 9	06/09/2003
50.	Letter from Tracy Hughes, General Counsel of the State of New Mexico's Environment Department to Wendell Smith of U.S. EPA Region 9	06/11/2003

51.	Letter from Ron Curry, Secretary of the State of New Mexico's Environment Department to Wayne Nastri Regional Administrator of EPA Region 9	06/27/2003
52.	E-mail from Deb Misra of the Navajo Nation EPA to EPA Region 9's Wendell Smith	06/27/2003 @ 4:08 P.M.
53.	FAX from Deb Misra of the Navajo Nation EPA to U.S. EPA Region 9's Wendell Smith	06/27/2003 @ 4:16 PM
54.	Letter from Wayne Nastri, Regional Administrator of EPA Region 9, to Tracy Hughes, General Counsel of the State of New Mexico	07/23/2003
55.	Letter from Wayne Nastri, Regional Administrator of U.S. EPA Region 9, to Stephen B. Etsitty, Director of the Navajo Nation EPA	07/31/2003
56.	Letter from Deborah Seligman, Director of Governmental Affairs of the New Mexico Oil & Gas Association, to Wayne Nastri, Regional Administrator of U.S. EPA Region 9	08/01/2003
57.	Letter from Alexis Strauss, Director of the Water Division of U.S. EPA Region 9, to Deborah Seligman, Director, Governmental Affairs of the New Mexico Oil and Gas Association	08/29/2003
58.	FAX from Deb Misra of the Navajo Nation EPA to U.S. EPA Region 9's Wendell Smith attaching Satya "Deb" Misra's Resume	12/15/2003 @ 9:22 A.M.
59.	FAX from Patrick Antonio of the Navajo Nation EPA To U.S. EPA Region 9's Wendell Smith transmitting a copy of the Navajo Nation's Surface Water Quality Standards Certification Regulations	12/15/2003 @ 2:06 P.M.
60.	FAX from Patrick Antonio of the Navajo Nation EPA to U.S. EPA Region 9's Wendell Smith	12/15/2003 @ 2:09 P.M.
61.	FAX from Edith M. Snyder of the Navajo Nation EPA to U.S. EPA Region 9's Wendell Smith attaching the resume of the Executive Director of the Navajo Nation EPA, Stephen Brian Etsitty	12/15/2003 @ 2:57 P.M.

62. Letter from Wayne Nastri, Regional Administrator of U.S. EPA Region 9 to appropriate governmental entities notifying them of the Proposed Findings of Fact regarding the Navajo Nation's Assertion of Authority to Administer the Water Quality Standards and Certification Programs under Sections 303 and 401 of the Clean Water Act — 07/26/2005

63. FAX from U.S. EPA Region 9's Wendell to Tom Llewellyn of the Law Offices of Thomas Sayre Llewellyn attaching a copy of the Proposed Findings of Fact — 09/09/2005

64. Letter from Wayne Nastri, Regional Administrator of U.S. EPA Region 9 to appropriate governmental entities notifying them of the Proposed Findings of Fact regarding the Navajo Nation's Assertion of Authority to Administer the Water Quality Standards and Certification Programs under Sections 303 and 401 of the Clean Water Act. This letter corrected an error in the Agency's previous notice which did not include the names and addresses of the appropriate governmental entities to which members of the public could submit their comments — 09/15/2005

65. Letter from Thomas Sayre Llewellyn of the Law Offices of Thomas Sayre Llewellyn to EPA Region 9's Wendell Smith regarding the Proposed Findings of Fact with respect to the Navajo Nation's Authority to Administer the Water Quality Standards and Certification Programs. Enclosed were comments by the Arizona Public Service Company — 10/18/2005

66. Letter from Jessica J. Youle of the Salt River Project U.S. EPA Region 9's Wendell Smith which supports and incorporates by reference the October 18, 2005 comments submitted to EPA Region 9 from the Arizona Public Service Company — 10/21/2005

67. Letter from Stephen B. Etsitty, Director of the Navajo Nation EPA, to U.S. EPA Region 9's Wendell Smith regarding clarification of the Navajo Nation's application for eligibility to establish water quality standards — 10/31/2005

68.	E-mail from Patrick Antonio of the Navajo Nation EPA to U.S. EPA Region 9's Wendell Smith transmitting a copy of the Navajo Nation's Surface Water Quality Standards	11/04/2005 @ 3:58 PM
69.	Memorandum from U.S. EPA Region 9's Wendell Smith to U.S. EPA Region 9's Ann Nutt (Office of Regional Counsel) and U.S. EPA Headquarters (Office of General Counsel) David Coursen regarding Region 9's Capability Assessment with respect to the Navajo Nation's Water Quality Standards and Certification Program Authorization Application	11/16/2005
70.	Letter from Patrick Antonio of the Navajo Nation EPA to U.S. EPA Region 9's Wendell Smith regarding responses to questions with respect to the Navajo Nations Water Quality Standards and the Arizona Public Service Company's Four Corners Power Plant	11/18/2005

APPENDIX II

FINDINGS OF FACT

APPENDIX II: FINDINGS OF FACT

NAVAJO NATION, ARIZONA, NEW MEXICO, UTAH
Decision Document for CWA Sections 303 and 401

RE: Factual information regarding direct impacts and potential direct impacts of existing and future activities of non-members within the exterior borders of the Navajo Reservation on the political integrity, economic security, and health and welfare of the Navajo Nation and its members.

This document contains factual findings upon which the United States Environmental Protection Agency (EPA) is relying in approving the Navajo Nation's (the "Nation" or "Tribe") Application for treatment in the same manner as a state (TAS), for purposes of establishing water quality standards and issuing water quality certifications under Clean Water Act (CWA) sections 303(c) and 401. This document adopts the Proposed Findings of Fact that the Agency previously distributed to appropriate governmental entities for comments relating to the Tribe's assertion of authority over nonmember activities. One comment was submitted on the Proposed Findings of Fact and it is fully discussed in the Response to Comments in Appendix III. A complete description of the governmental functions, tribal codes, judicial systems, and reservation environment is provided in the Decision Document to which these Findings of Fact are appended.

The Navajo Nation's Reservation is the largest Indian reservation in the United States, including 17,585,494 acres within its reservation boundaries as established by the Treaty of June 1, 1868 and expanded by subsequent executive orders. The original Application submitted by the Nation included all lands in the formal Reservation and the Eastern Agency area in New Mexico, with a few exceptions. The Nation subsequently narrowed the scope of the Application to lands in the formal Navajo Reservation, including the satellite reservations, and Tribal trust lands in the Eastern Agency, but excluding all Eastern Agency lands other than Tribal trust lands and excluding Morgan Lake, the only Tribally identified surface water located on certain lands the Tribe leases to Arizona Public Service Company. For the sake of simplicity all lands covered by the Nation's Application are referred to in this document as the "Reservation" or "Navajo Reservation."

The percentage of non-member land covered by the Tribe's Application is relatively small. The Supreme Court has cited data indicating that over 95% of Reservation land is Tribally owned, with the remainder, owned in fee by non-members, occupying more than 750,000 acres. *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 657 n. 12 (2001).

The following information is organized to present evidence and other information on the relationship between nonmember activities within the exterior boundaries of the Navajo Reservation and impairment of water quality and beneficial uses of water by the

Navajo Nation. The facts summarized below from the files of EPA and from materials submitted by the Tribe are organized to support EPA's conclusion that the Tribe has shown that existing and potential future nonmember activities within the Reservation that affect water quality have or may have direct impacts on the political integrity, economic security and health or welfare of the Tribe that are serious and substantial.

Surface water is a scarce and highly-valued resource on the Navajo Reservation. The scarcity is due to the limited precipitation in the arid climate. The climate means that the Reservation's waters do not function identically to water systems in moister climates, where surface waters may be present for much or all of each year. The Reservation contains permanent streams and rivers, but also contains many ephemeral stream and river beds that are dry much of the time. When precipitation events occur, however, surface water flows through those beds, and the Reservation functions as if it contained a traditional watershed.

The scarcity of water on the Reservation can increase the potential impact of any impairment of water quality on the Navajo Nation. The Nation's Application describes in detail the importance of surface water quality to the Nation and the many ways the Tribe uses surface waters. Maps provided by the Navajo Nation show all the waters within the Navajo Reservation, including the satellite reservations, that are subject to protection under the Clean Water Act. These waters are used by the Tribe and by individual members for crop irrigation, livestock and wildlife watering, fishing, ceremonial and religious uses, and in some instances domestic uses. The Reservation includes a limited number of parcels of nonmember fee lands, scattered around the Reservation, as shown on the maps included in the Tribe's Application as Exhibits C and G. As already noted, although fee lands occupy only a small part of the Reservation, their total area is more than 750,000 acres. Any nonmember activity that impairs water quality on those scattered fee lands will affect the water quality of neighboring Tribal lands inhabited by Tribal members. Similarly, nonmember activities on Tribal lands subject to the Clean Water Act will directly affect the water quality on those lands.

The following sections contain information to show that the Tribe has inherent authority, under the *Montana* "impacts" test, over nonmember activities affecting water quality based upon the actual or potential impacts of nonmember activities. The first section addresses how the Clean Water Act water quality management functions that the Tribe proposes to carry out protect uses of Tribal waters. The second section describes how unregulated activities can cause water quality degradation. The final section discusses specific examples of nonmember activities currently taking place on the Reservation, on both Tribal and nonmember land, to illustrate how those activities affect the Tribe.

A. Role of functions authorized under the Clean Water Act in protecting the Tribe's ability to use and benefit from its water resources

The Clean Water Act calls for the maintenance and restoration of the physical, chemical and biological integrity of waters of the United States. Water quality standards are provisions of federal, state, or tribal law that consist of designated uses, water quality requirements to protect those uses, an antidegradation policy and other general policies that affect the implementation of the standards, such as mixing zone and variance policies. Water quality standards serve the dual function of establishing water quality goals for specific water bodies and serving as the regulatory basis for water quality-based treatment controls and strategies. The objective of the CWA, maintenance and restoration of the integrity of the nation's waters, is directly related to water quality standards that are intended to ensure the full protection of all existing uses and designated uses identified by states and tribes.

Tribal water quality standards are intended to protect the beneficial uses and water quality of reservation streams, rivers, and associated tributaries. In addition to designated uses and requirements, water quality standards include antidegradation provisions that protect all existing uses of surface waters regardless of whether such uses are actually designated in water quality standards. Antidegradation requirements also serve to maintain and protect high quality waters and waters that constitute an outstanding national resource. Further, antidegradation requirements can be utilized by tribes and states to maintain and protect the quality of surface waters that provide unique cultural or ceremonial uses.

The Tribe has formally designated the following as uses for water within the Reservation: domestic water source; source for fish and aquatic life; source for recreation in and on the water; source of sustenance for Reservation wildlife; and source for agricultural, industrial and navigational uses. The Tribe's Application also indicates that the Tribe uses the water for ceremonial and cultural purposes. Tribal authority to carry out management and protection functions for Tribal water resources relates to protecting Tribal uses in the following ways:

1. Domestic uses

There are fourteen Navajo Nation drinking water systems supplied by surface water. The San Juan River provides drinking water for Shiprock, NM; Nenahnezad, NM; and Mexican Hat, UT. Lake Powell provides drinking water for LeChee, AZ, and the Salt River Project Navajo Generating Station. The remaining drinking water systems make use of surface water fed by artesian springs.

Carrying out management and protection functions for Reservation waters enables the Tribe to protect the quality of water used for domestic purposes. Such

protection, in turn, protects human health by reducing risks of human exposure to disease from conventional and non-conventional pollutants, including toxics in domestic water, particularly where water is used for human consumption. It also protects humans from the effects of exposure from other domestic uses, including cooking and bathing.

2. Uses relating to fish and other aquatic life and wildlife

a. Importance to the Tribe

The Navajo Nation and its members use Tribal waters for wildlife watering and fishing. Tribal authority to protect water quality can prevent or limit water quality-degrading activities that harm fish and wildlife that live in Tribal waters or that use and depend on those waters as a source of water, food, or habitat. Such activities can harm the Tribe's economic security and the health and welfare of the Tribe and its members by reducing the supply of Tribal food sources and by introducing toxins that increase the harm from eating such food sources. To the extent the food sources have economic value, degradation of water quality can cause economic harm to the Tribe and its members.

Fish and wildlife may also produce economic value from hunting or fishing activities. The Navajo Fish & Wildlife Department within the Division of Natural Resources issues permits to regulate hunting and fishing within the Navajo Nation. Permit fees provide revenue to the Nation, and persons who hunt or fish on the Reservation generate other revenue for the Tribe and its members by spending money on the Reservation for food, lodging, and other purposes. Protecting the quality of Tribal waters to ensure that hunting and fishing remain desirable enables the Tribe to protect those economic benefits, and enhances the Tribe's long-term economic security by preserving the value of fish and wildlife resources.

Wildlife, plants, and fisheries are a part of Navajo culture and Tribal authority to protect water quality can protect traditional uses of those resources. The Navajo world view is a traditional one in which the air, water, people, and wildlife are all interrelated. Navajo traditional ceremonies and practices include the use of: feathers from specific bird species; skin pelts and oils from specific animal species; implements derived from the bones of specific animal species; leather derived from specific animal species; baskets woven with specific plant species; and sinew from certain deer species that is used in bow making. Tribal members also use numerous plant and insect species for traditional medicine, and as tobaccos, concoctions, and cosmetics. Those uses all depend on the availability of those species, which may be affected by impacts to water quality.

b. Role of water quality management in protecting the resources

Water quality management protects fish and other aquatic life, including plant life, and ensures the health and safety of Tribal members who use the fish or plants as a food source. It protects the Tribe's economic well-being to the extent that the fish and aquatic life are Tribal resources.

Water quality management protects and enhances the value of fish and other aquatic life by helping to ensure that aquatic ecosystems can function normally to sustain the life forms that depend on them. Functions of an aquatic ecosystem include chemical cycling (through oxygen production), water purification, and the provision of diversity and productivity of life within Tribal waters. By sustaining fish and other life forms, the system protects the Tribe's ability to use and rely on those life forms to achieve the Tribe's food, aesthetic and educational/scientific goals. Fully protecting aquatic life use also helps ensure the economic well-being of both the Tribe and its members through harvest of fish and other aquatic life and encouragement of water-based recreation businesses.

Water quality management protects wildlife, by helping ensure that birds, mammals, reptiles, and amphibians that use and depend upon Tribal waters as a source of water, food, or habitat will maintain the species diversity and productivity that Tribal lands and waters are capable of supporting. Game animals, birds, and fish bioaccumulate toxins from water and the food chain, and vegetation bioaccumulates toxins from water and soils. The toxins, in turn, also bioaccumulate in humans who consume food containing the toxins. Thus, protection of water quality to protect the wildlife use protects the health of Tribal members who eat fish or plants from toxins that can accumulate in wildlife; preventing such bioaccumulation is particularly important because Tribal members consume more wild game and native plants than the general public, for subsistence, dietary supplementation, and medicinal and cultural practices. Finally, protection of the wildlife use helps ensure the Tribe's economic well-being to the extent that wildlife is an economic resource for the Tribe.

3. Traditional and ceremonial uses

Water quality management functions protect a tribe's culture and health and safety by protecting tribal traditional and cultural water uses. The CWA allows states and tribes to set water quality standards to protect any beneficial uses they deem appropriate. Thus, the Navajo Nation may adopt water quality standards that protect traditional and cultural beneficial uses.

The protection of surface water quality is also important to maintain the traditional uses of water by Navajo ceremonial practitioners. These Navajo ceremonial practitioners are aware of the exact location of natural springs and other water sources

that are used in traditional cultural observances. In certain cases, Navajo ceremonial practitioners will utilize different water sources for different parts of a traditional ceremony.

4. Recreational uses

Water quality management protects recreation in and on the water, thereby helping ensure that Tribal members and nonmembers can enjoy the recreational use of waters for body contact during play and sport without undue threat of disease or loss of aesthetic pleasure. The Tribe's economic well-being is enhanced through recreational harvesting of aquatic life, including fishing by non-members, and encouragement of water-based recreation.

The Navajo Parks and Recreation Department of the Division of Natural Resources issues permits for rafting, scientific studies, and general access on the San Juan River. The Tribe also receives permit fees for boating activities on lakes and access fees for vehicles to the Asaayi Lake Park. In addition to the fees the permits generate for the Tribe, persons engaging in such permitted activities may also spend money on the Reservation for other purposes, including food and lodging. The Tribe's ability to manage and protect water quality in the San Juan River and other Tribal waters can protect Tribal recreation and tourism, by ensuring that water quality is adequate to make it desirable to engage in recreational activities on the Reservation. That will protect the Tribe's economic security by protecting future revenues and other economic benefits from those permitted activities and preserving the value of Tribal recreational resources.

5. Agricultural uses

Agricultural activities are important on the Reservation, and additional agricultural activities may occur on Reservation lands in the future. The Navajo Indian Irrigation Project is allowed 508,000 annual acre-feet of water from the San Juan River (Navajo Reservoir) to irrigate farm land of the Navajo Agricultural Products Industry. Livestock grazing activities occur on the Reservation and additional grazing may occur in the future. Whether such activities are carried out by Tribal members or by nonmembers, they may have impacts on Tribal waters.

Water quality management protects agricultural uses important to the Tribe's health and economic welfare, protecting the quality and value of crops and livestock by controlling contaminants that may enter crops through irrigation or may be consumed by livestock through watering or feeding from Tribal waters. Such management also directly protects human health by reducing the risks that contaminants in livestock and crops will be ingested by, and bioaccumulate in humans, including Tribal members. Finally, such management can reduce harmful effects from agricultural practices that

disturb the soil and increase erosion and can limit harm from runoff carrying contaminants into Tribal waters.

B. Effects of unregulated human activities on Tribal resources

As already explained, the Clean Water Act calls for the maintenance and restoration of the physical, chemical, and biological integrity of waters of the United States, including tribal waters. The record establishes that the Reservation characteristics are such that the following human activities may occur: septic system operation; energy production; forestry; and agriculture, and livestock-raising, including the use of herbicides and pesticides. Those activities, if unregulated, can cause pollution that harms Tribal resources in the following ways:

Septic systems and septic disposal facilities can have serious impacts on water quality. Improper operation of, or accidents at, septic systems can release fecal contamination into Tribal waters. Fecal coliforms are indicators of health risks resulting from the presence of human wastes in water. Such wastes may harm humans who drink, bathe, cook with, or otherwise come in contact with tribal waters so contaminated. Drinking water sources can also become contaminated by airborne pollutants, nonpoint source pollutants, and any other pollutants that enter the surface water.

Improper operation or accidents at septage disposal systems may cause discharges that result in increases in loadings of ammonia, bacteria, and oxygen-demanding substances (BOD). Ammonia and its breakdown products may also serve as nutrients for excessive plant growth and as sources of oxygen demand, which can lower oxygen levels in tribal waters. Because rather small shifts in pH and temperature can significantly increase the toxicity of ammonia, effects of discharges on the growth and survival of aquatic life may occur far downstream from discharges. Increases in BOD loading can result in reduced oxygen levels, which affect aquatic life survival, growth, and productivity.

Energy production and transport occur on the Reservation. When improperly managed, crude oil extraction and production can result in oil spills from production flow lines or major pipelines. Oil spills have the potential to impact water quality. Coal mining activities occur on a large scale on the Reservation and also have the potential to damage water quality in a variety of ways, as discussed further in the following section.

Agricultural, grazing, and forestry practices can increase water turbidity and sediment deposition by disturbing topsoil, which then more readily erodes, entering water bodies through runoff or other processes. Turbidity and fine sediments can affect aquatic life in Tribal waters by reducing photosynthesis of plant life, by interfering with sight feeding of fish, by smothering fish eggs and insect life, and by reducing the habitat available for food organisms and fish reproduction. And livestock grazing practices can

degrade water quality by increasing soil erosion, altering stream banks and surrounding habitat, destroying native vegetation and riparian areas, raising water temperature and increasing turbidity, sediment levels and fecal contamination of surface waters.

Improper use of herbicides and pesticides in forestry, agriculture, or other activities can cause increased loadings of toxic contaminants in runoff as a result of irrigation or precipitation or both. Depending on the concentrations, these loadings may cause direct mortality or reduction of growth and reproduction in fish and invertebrates. Such loadings may also increase health risks to Tribal members by increasing their exposure to herbicides and pesticides present in fish flesh or drinking water taken from Tribal water bodies or from ingestion of wildlife that feed upon aquatic plants or animals in Tribal water bodies. The risks can be further increased if the contaminants bioaccumulate in Tribal members.

Diversion of surface or groundwater for agricultural uses, which is then returned to surface water bodies, can result in harmful effects on water quality and the integrity of aquatic communities by adding pollutants, by increasing stream temperatures, and by the loss of physical habit for fish and other aquatic life in Reservation waters. Associated increased stream temperatures may exceed levels necessary for optimal growth and cause direct mortality.

Agricultural runoff may carry constituents such as chicken manure that are high in both nitrogen and bacteria, identified as significant sources of water quality degradation, and may cause increases in loading of nutrients (primarily nitrogen and phosphorus compounds). Cow manure from animal feedlots may also produce excess nutrients. These nutrients can stimulate undesirable increased growth of vegetation in lakes or streams. High concentrations of phytoplankton (microscopic plants) or larger plants are known to result in undesirable changes in water quality on a daily or seasonal basis. For example, excessive vegetation may result in very low levels of dissolved oxygen during dark hours when photosynthesis does not occur but respiration continues. Stimulation of plant growth from excessive nutrients may result in low dissolved oxygen and fish kills.

C. Impacts of nonmember activities on the Tribe

The following discussion provides specific examples of current nonmember activities on Tribal lands and nonmember lands within the Reservation, and discusses how those activities affect the health and welfare of the Tribe and its members.

1. Specific examples of existing or potential nonmember activities on fee lands

In its application and supplemental materials, the Navajo Nation provided the following information regarding nonmember activity that may impact water quality on Reservation lands.

a. Fee lands in the St. Michaels, AZ area

Fee lands in the St. Michaels, AZ area contain private residences, a school, and commercial businesses. Potential water quality impacts from these fee lands would include untreated sewage from faulty residential septic systems and excessive sediment transport from livestock overgrazing and leaking water wells. These fee lands drain into Black Creek, which has the following designated uses under the Navajo Nation Water Quality Standards: primary and secondary human contact, ephemeral warm water habitat, and livestock and wildlife watering.

b. Fee lands in the Houck, AZ area

Fee lands in the Houck, AZ area contain private residences, a school, and commercial businesses. Potential water quality impacts from these fee lands would include untreated sewage from faulty residential septic systems and excessive sediment transport from livestock overgrazing and leaking water wells. These fee lands drain into the Puerco River, which has the following designated uses: domestic water supply, secondary human contact, ephemeral warm water habitat, and livestock and wildlife watering.

c. Fee land in Indian Wells, AZ

Fee lands in Indian Wells, AZ contain a sand and gravel operation. Potential water quality impacts from these fee lands would be excessive sediment transport from storm water runoff at this industrial site. This fee land drains into Cottonwood Wash, which has the following designated uses: secondary human contact, ephemeral warm water habitat, and livestock and wildlife watering.

d. Fee lands in the Wide Ruins, AZ area

Fee lands in the Wide Ruins, AZ area contain rangeland. Potential water quality impacts from these fee lands would be excessive sediment transport from livestock overgrazing. This fee land drains into Wide Ruins Wash, which has the following designated uses: secondary human contact, ephemeral warm water habitat, and livestock and wildlife watering.

e. Fee lands in the Cameron, AZ area

Fee lands in the Cameron, AZ area contain private residences and commercial businesses, including a motel, restaurant, and a recreational vehicle park. Potential water quality impacts from these fee lands would include untreated sewage from faulty residential septic systems and excessive sediment transport from both livestock overgrazing and storm water runoff at construction sites. During storm events, these fee lands drain into the ephemeral Little Colorado River (LCR) and Tappan Wash, which have the following designated uses: domestic water supply (LCR), primary human contact (LCR), secondary human contact (both), ephemeral warm water habitat, and livestock and wildlife watering (both). The Cameron Trading Post also has a tertiary wastewater treatment facility (secondary treatment, filtration and UV disinfection) with design capacity of 66,000 gallons/day. In the past an oil/grease trap that serves the restaurant at the Trading Post has overflowed and run off the edge of the cliff, causing the potential for oil and grease to migrate down drainage. During storm events, discharges from the Cameron Trading Post enter the ephemeral Little Colorado River and then –almost immediately– flow back onto Tribal trust land, thereby affecting the quality of the water on that Tribal trust land.

f. Fee lands in the Tuba City, AZ area

Fee lands in the Tuba City, AZ area contain private residences, commercial businesses, and a concrete plant. Potential water quality impacts from these fee lands would include untreated sewage from faulty residential septic systems and excessive sediment transport from livestock overgrazing and storm water runoff at construction sites. These fee lands drain in to the Moenkopi and Hamblin Washes, which have the following designated uses: secondary human contact (both), ephemeral warm water habitat (both), livestock and wildlife watering (both) and agricultural water supply (Moenkopi).

g. Fee lands in the Oljeto/Monument Valley, UT area

Fee lands in the Oljeto/Monument Valley, UT area contain private residences, a hospital, a school, and commercial businesses. Potential water quality impacts from these fee lands would include untreated sewage from an overflowing sewer lagoon system and excessive sediment transport from livestock overgrazing and storm water runoff at construction sites. These fee lands drain into Oljeto Wash, which has the following designated uses: secondary human contact, ephemeral warm water habitat, and livestock and wildlife watering. In addition, the Goulding's Lodge holds an NPDES permit for the discharge of treated wastewater effluent from a 3.25-acre lagoon facility to Mitchell Butte Wash (dry wash), a tributary of the Oljeto Wash. The facility is permitted to discharge up to 72,000 gallons per day.

h. Activities on Satellite Reservations

Similar situations may arise with respect to fee land within the satellite reservations as well. For example, the Canoncito Navajo Day School is located on one of the small portions of fee land within the Canoncito Reservation (T1ON, R3W, NE/8 13). The Canada del los Apaches wash runs adjacent to the school, and the school land has been known to be flooded. Thus, any discharges from the school are bound to affect the water quality of surrounding Tribal trust land.[1] Similarly, the Canado del Ojo wash runs through another partial section of fee land within the Canoncito Reservation (T10N, R2W, NE/4 § 10), while several sections of fee land within the Ramah Navajo Reservation lie within drainage areas (T6N, R14W, § 20; T7N, R14W, § 34; T7N, R16W, NW/4 § 22 - Terrero Draw runs through; T8N, R15W, § 8 - significant drainages; T8N, R15W, § 14; T1ON, R15W, § 30; T1ON, R16W, NW/4 § 14). Water quality degrading activities on any of these lands could affect the health, safety and welfare of Navajo members on surrounding trust lands.

2. Nonmember activities on trust lands

The Nation has stated in its Application that, "to the extent that non-member activities take place on tribal trust lands, it is likely that those activities will be taking place pursuant to a business lease or other similar consensual relationship with the Navajo Nation or an individual Navajo." Further, the vast majority of people living on Navajo trust lands within the formal Reservation and in other areas covered by the application are American Indian, primarily Navajo. Thus, any pollutants discharged into surface waters running through those Reservation trust lands would have a high potential of affecting the health and welfare of the Navajo Nation and its members.

The following are examples of nonmember activities occurring on trust lands:

a. Peabody Coal

Peabody Western Coal Company operates a complex of surface coal mines consisting of two separate but adjacent operations, the Black Mesa and Kayenta mines. The Black Mesa mine serves the Mohave Generating Station by a coal slurry pipeline; the Kayenta mine serves the Navajo Generating Station by rail. The complex is covered by mineral rights leases from the Navajo Nation and Hopi Tribe. The complex spans nearly 62,800 acres across the Navajo Nation and Hopi Reservation. Annual production is about 12 million tons. There are a total of 110 sedimentation ponds at both mines, all

[1] This school serves a Navajo community and 98% of the 400 plus students are Navajo. (This information was gathered in a telephone call from Yolanda Barney, Navajo Nation EPA, to the school registrar, on March 23, 1999.)

of which have a potential to discharge during storm events into receiving waters that are ephemeral streams. The coal slurry pipeline from the Black Mesa mine has been the subject of past enforcement actions for slurry line releases.

b. BHP Minerals

BHP Minerals operates the Navajo Mine, a surface coal mining operation located on the northeast corner of the Navajo Nation. The production from this mine is dedicated to the Four Corners Power Plant. The mine facility has 18 outfalls, with sedimentation ponds that have potential to discharge during major storm events. The facility has not had a discharge since the permit was issued in 1977. If or when a major precipitation event occurs, the Navajo Mine would discharge to Morgan Lake (a cooling pond on land leased by Arizona Public Service (Four Corners Power Plant) that is not covered by this approval), and to Chaco Creek, a tributary of the San Juan River, which is covered. Such discharges, thus, could carry waste from the mines into Tribal waters, including the San Juan River, potentially degrading Tribal water quality and threatening the health and welfare of the Tribe and its members.

c. Mountain States Petroleum Corp.

Mountain States Petroleum operates a crude oil production facility located in the northern sector of the Navajo Nation. Discharge from the facility is treated produced water, which is water that is extracted with the oil. The produced water is separated from the oil and treated in settling ponds prior to discharge. The facility discharges into an unnamed tributary to the Chinle Wash and ultimately to the San Juan River. Discharges of inadequately treated water during storm events could threaten Tribal health and welfare.

D. Conclusion

In sum, the facts described concerning nonmember activities on the Reservation support EPA's conclusion that the Tribe has shown that existing and potential future nonmember activities within the Reservation have or may have direct effects on the political integrity, economic security and health or welfare of the Tribe that are serious and substantial.

APPENDIX III

RESPONSE TO COMMENTS

APPENDIX III

RESPONSE TO COMMENTS ON NAVAJO NATION APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE (TAS) UNDER § 518 OF THE CLEAN WATER ACT FOR PURPOSES OF ADMINISTERING CWA §§ 303 (c) AND 401.

By letters dated December 28, 2000, and April 8, 2002, EPA notified the appropriate governmental entities as to the substance and basis of the jurisdictional assertions in the Navajo Nation's original and modified TAS Applications, respectively. At the time of each notification, EPA published notices in local newspapers informing the public of the opportunity to comment through the appropriate governmental entities. On September 15, 2005, EPA transmitted to the appropriate governmental entities Proposed Findings of Fact regarding the impacts of nonmember activities within the Reservation on water quality and the Navajo Nation; EPA requested comments on whether it should use those facts as the basis for its decision regarding the Tribe's authority over nonmember activities.

EPA regulations require EPA, after receiving a tribe's application, to provide notification, including "information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters," to "appropriate governmental entities" for comments. 40 C.F.R. § 131.8(c). Comments "shall be limited to the Tribe's assertion of authority." 40 C.F.R. §131.8(c). EPA defines appropriate governmental entities as states, tribes, and federal agencies with lands adjacent to the applicant tribe's reservation. 56 Fed. Reg. 64876, 64886 (December 12, 1991)(preamble to EPA regulations governing TAS for water quality standards). EPA's practice is to also offer supplemental application material and Proposed Findings of Fact for comment, and to address all comments received during the comment period, including comments sent directly to EPA from non-governmental entities.

1. EPA received the following comments from appropriate governmental entities.

Comment:

The U.S. Department of the Interior Bureau of Land Management, by letter dated January 26, 2001, generally supported the Tribe's Application, but expressed concerns about its "apparent inclusion of BLM public lands" located within the Eastern Agency. BLM sent two additional letters in response to the modified Application, the first dated May 15, 2002, the second June 19, 2002. Both letters expressed support for the Tribe's modified Application.

Response:

EPA notes that the two most recent BLM letters each offered unqualified support for the the modified Application. The May 15 letter stated that BLM is "looking forward to continuing our cooperation with [the Tribe] in the future in the watersheds of the Little Colorado River and elsewhere, where our responsibilities for maintaining and improving the nation's water quality are shared." EPA concludes that BLM does not intend to raise a "competing or conflicting claim," 40 C.F.R. §131.8(c)(4), as to the modified Application; the only lands in the Eastern Agency included in the Application are trust lands, which means it does not claim any of the public lands identified in the original BLM comment.

Comment

The Pueblo of Zuni commented by letters dated February 13, 2001, and May 3, 2002. The first letter stated that the Tribe should not assert authority over certain Eastern Agency lands at Fort Wingate held in trust jointly for the use of the Tribe and the Pueblo. The Pueblo also commented that EPA should in no event approve state authority for water quality standards in any area claimed by the Navajo Nation, and that the Pueblo should have an opportunity to review any Navajo proposals to take regulatory action. The second letter indicated that the Pueblo was no longer concerned about the joint-use area and reiterated the two other comments.

Response

EPA is authorizing the Tribe, and not a state, to set water quality standards in this decision. The decision does not cover any Eastern Agency lands not held in trust for the Navajo Nation, and, therefore, excludes the joint use area. And the Pueblo will have an opportunity to participate when EPA considers whether to approve Navajo water quality standards.

Comment

The Arizona Department of Environmental Quality, by letter dated March 28, 2001, generally supported the Tribe's Application, but expressed concerns about the potential consequences if the Tribe and State were to set differing water quality standards for the same water body. The State submitted additional comments on April 30, 2002 noting that the State and Tribe had agreed to work cooperatively, and withdrew its suggestion that EPA condition its approval.

Response

EPA appreciates the State's comment. EPA notes that, as required by Section 518(e) of the Clean Water Act, it has, at 40 C.F.R. § 131.7, established a mechanism for addressing

any unreasonable consequences that may arise as a result of differing water quality standards that may be set by states and tribes located on common bodies of water. EPA supports the efforts of the Tribe and State to work cooperatively to ensure protection of water quality for all affected persons.

Comments

The National Park Service of the U.S. Department of the Interior, by letter dated May 7, 2002, expressed its support for the approval of the Tribe's Application. The State of Utah, by letter dated May 13, 2002, stated that it had received no comments from interested parties and that it had no comments or objections to the Tribe's Application. The Pueblo of Laguna, by letter dated May 20, 2002, expressed support for the Tribe's jurisdictional claim.

Response

EPA appreciates receiving the comments supporting or offering no objections to EPA approval of the Tribe's Application.

Comment

The State of New Mexico, by letter dated August 29, 2002, expressed support for the Tribe's Application generally but asserted that the Tribe had not presented sufficient evidence to support its claims as to lands within the Eastern Agency, particularly lands owned in fee by nonmembers. The State submitted an additional comment letter dated June 27, 2003 providing "revisions" to its previous comments. The State expressly withdrew its earlier comment that Application contained insufficient information about the substance and basis of the Tribe's claim of authority. It also withdrew "any objections to the Navajo Nation's assertion of jurisdiction over surface waters within reservation and trust lands," including trust lands in the Eastern Agency. And it recognized that the Navajo Nation has a valid jurisdictional claim under the CWA and its implementing regulations over water resources within reservation and trust lands. But the letter also maintained its objections to Tribal claims for non-trust lands within the Eastern Agency.

Response

As noted in the Decision Document, the Tribe modified its Application to exclude non-trust land in the Eastern Agency. EPA believes, therefore, that the State's comments have been addressed by changes in the Application and are now moot.

2. Other comments

EPA also received the following comments from non-governmental entities:

Comment

The San Juan Water Commission's August 30, 2002 comments were generally supportive of the Tribe's Application. But they echoed New Mexico's concerns, described above, that the Tribe had not clearly identified what lands in the Eastern Agency were included in Application, and expressed concern that "many property owners cannot tell whether they are in or out of the proposed new jurisdictional bounds." The comment also asserted that the Tribe should not be approved for fee lands within the Eastern Agency.

The New Mexico Wool Growers and the New Mexico Cattle Growers' Association, in separate comment letters dated August 30, 2002, characterized the Tribe's jurisdictional assertions as "vague and overly broad."

By letter dated August 29, 2002, the Utilities Division of the City of Gallup offered comments generally supporting the Tribe's jurisdictional assertion, but asserted "that the Tribe lacks authority to regulate activities on fee lands outside of the exterior boundaries of the reservation in the Gallup area," in the Eastern Agency. August 29, 2002 comments by Gamerco Associates, a partnership that owns fee land near Gallup and August 30, 2002, comments submitted on behalf of Energy Development Co., a power producer considering a project in McKinley County, New Mexico, expressly concurred in the Gallup comments.

The New Mexico Oil and Gas Association's comments dated August 29, 2002 also expressed concerns about the Tribe's claims regarding the Eastern Agency.

Response

As noted in the Decision Document, the Tribe modified its Application to exclude fee land in the Eastern Agency. EPA believes, therefore, that the changes the Tribe made to its Application resolved the earlier concerns, making the comments moot.

Comment

August 29, 2002 comments from the New Mexico Oil and Gas Association asserted that, in light of *Nevada v. Hicks,* 533 U.S. 353 (2001), EPA must use the test set forth in *Montana v. U.S.,* 450 U.S. 544 (1981) to analyze the impacts of nonmember activities on trust land in order to determine whether the Tribe has authority over those activities.

Response

As stated in footnote five of the Decision Document:

> EPA has not resolved whether it is necessary to analyze under the *Montana* test

the impacts of nonmember activities on tribal/trust lands * * * to find that a tribe has inherent authority to set water quality standards for such areas. EPA believes, however, that, as explained in this Decision Document, the Tribe could show authority over nonmember activities on tribal/trust lands covered by the Application under the *Montana* 'impacts' test."

Comment

The New Mexico Oil and Gas Association asserts that EPA cannot approve the Tribe for trust lands located outside the Reservation. The comment acknowledges that EPA has construed the Clean Water Act to authorize approval of Tribes for such areas, but claims that EPA's interpretation is based on a misreading of *Oklahoma Tax Com'n v. Potawatomi Indian Tribe,* 498 U.S. 505 (1991).

Response

In response to similar comments in 1991, EPA set forth its interpretation of the Clean Water Act "reservation" requirement in the Preamble to the Water Quality Standards Regulations as follows:

> Under today's rule, Tribes are limited to obtaining treatment as a State status for only water resources within the borders of the reservation over which they possess authority to regulate water quality. The meaning of the term "reservation" must, of course, be determined in light of statutory law and with reference to relevant case law. EPA considers trust lands formally set apart for the use of Indians to be "within a reservation" for purposes of section 518(e)(2), even if they have not been formally designated as "reservations." [citing *Potawatomi*, 498 U.S. at 510]. This means it is the status and use of the land that determines if it is to be considered "within a reservation," rather than the label attached to it. 56 Fed. Reg. 64876, 64881 (December 12, 1991)

That remains the Agency's position.

Comments:

Arizona Public Service Company (APS) operates a power plant on land leased from the Tribe. The Salt River Project operates the Navajo Generating Station on land leased from the Tribe on similar terms. There is an ongoing disagreement between the Tribe and the lessees as to whether certain provisions in the leases preclude the Tribe from regulating the lessees.

APS commented three times: on February 9, 2001, on June 24, 2002, and in response to the Proposed Findings of Fact, on October 18, 2005. In its comments, APS agreed with the Tribe that, for purposes of this TAS decision, EPA need not resolve the disagreement

between APS and the Tribe about whether the Tribe has authority to regulate the Plant. APS requested that EPA defer that decision in its entirety and make clear that EPA's TAS approval does not necessarily mean that Navajo Nation water quality standards approved by EPA may be used to develop effluent limitations applicable to the plant.

A September 23, 2002 comment letter on behalf of the Salt River Project stated that "EPA has consistently excluded NGS from its [previous] determinations regarding the Nation's regulatory authority and jurisdiction." The commenter said it "concurs with the Nation's position that its regulatory authority over NGS should not be decided at this time," and requested that "EPA expressly exclude NGS from any determination regarding the Navajo Nation's regulatory jurisdiction and authority necessary for a final decision on the Nation's Application for treatment as a state."

An October 31, 2005 clarification letter from the Tribe specifically reiterated the APS comment that "'EPA need not decide the question of the Nation's authority to regulate the [Four Corners Power] Plant in the present proceeding.'"

Response:

EPA agrees with APS, the Salt River Project, and the Tribe that the Agency need not decide the Tribe's authority over the plants in this decision. As explained in the Decision Document, the only listed Tribal water within the leased areas is Morgan Lake, which the Tribe excluded from the scope of its Application as clarified by the Tribe's October 31 letter. Accordingly, footnote four of the Decision Document states:

> In approving the Tribe's Application, EPA is not making any findings about the Tribe's authority over Morgan Lake or the Four Corners Power Plant and Navajo Generating Station or their owners and operators. EPA also is deferring the issue of whether the Tribe's water quality standards, if and when approved by EPA, would apply to any CWA-permitted discharges from these facilities to Tribal waters. To the extent necessary, EPA will consider these issues, and how they relate to the lease provisions, in the context of future permitting or other relevant action taken by EPA.

Comment

APS's October 18, 2005, comments on the Proposed Findings of Fact pointed to certain inaccuracies in the discussion of the Plant.

Response

EPA has accepted those comments and modified the Findings of Fact accordingly.

Comment

APS's October 18, 2005, comments also asserted that the Tribe could not show authority over reservation fee lands under the tests set forth in relevant Supreme Court decisions.

Response

EPA disagrees, for reasons set forth in the Decision Document.

Comment

The October 18, 2005, APS letter also presented a comment that was unrelated to the Tribe's assertion of authority. APS asserted that EPA's procedures for TAS approvals do not provide adequate notice and comment to meet the requirements for rulemaking set forth in the Administrative Procedures Act (APA), which generally requires publication in the *Federal Register*, the naming of affected parties, and provision of actual notice.

Response

EPA disagrees. This TAS approval is an informal adjudication, not a rulemaking under the APA. Moreover, EPA complied with the notice and comment requirements in its regulations. 40 C.F.R. § 131.8(c)(2).

APPENDIX IV

LIST OF TRIBAL WATERS

Table 204.1 Designated Uses for Navajo Nation Surface Waters

Surface Water Body	Basin	Cataloging Unit	Domestic Water Supply (Dom)	Primary Human Contact (PrHC)	Secondary Human Contact (ScHC)	Agricultural Water Supply (AgWS)	Fish Consumption (FC)	Aquatic Habitat (AqHbt)	Livestock and Wildlife Watering (L&W)
Tatahatso Wash, mouth to headwaters	Lower Colorado	Lower Colorado-Marble Canyon			ScHC			AqHbt	L&W
Shinumo Wash, mouth to headwaters	Lower Colorado	Lower Colorado-Marble Canyon			ScHC			AqHbt	L&W
Tiger Wash, mouth to headwaters	Lower Colorado	Lower Colorado-Marble Canyon			ScHC			AqHbt	L&W
Tanner Wash, mouth to headwaters	Lower Colorado	Lower Colorado-Marble Canyon			ScHC			AqHbt	L&W
Colorado River, mouth of Little Colorado River to mouth of Paria River	Lower Colorado	Lower Colorado-Marble Canyon	Dom	PrHC	ScHC		FC	AqHbt	L&W
Colorado River mouth of Paria River to Glen Canyon Dam	Upper Colorado	Lower Lake Powell	Dom	PrHC	ScHC		FC	AqHbt	L&W
Antelope Creek, Lake Powell shoreline at elevation 3720 feet to headwaters	Upper Colorado	Lower Lake Powell		PrHC	ScHC			AqHbt	L&W
Kaibito Creek, Lake Powell shoreline at elevation 3720 feet to headwaters	Upper Colorado	Lower Lake Powell		PrHC	ScHC			AqHbt	L&W
Navajo Creek Lake Powell shoreline at elevation 3720 feet to headwaters	Upper Colorado	Lower Lake Powell		PrHC	ScHC			AqHbt	L&W
Aztec Creek, Lake Powell shoreline at elevation 3720 feet to headwaters	Upper Colorado	Lower Lake Powell		PrHC	ScHC			AqHbt	L&W
Little Colorado River, mouth to origin of perennial flow (between mouth of Lee Canyon and USGS Gaging Station)	Little Colorado	Lower Little Colorado	Dom	PrHC	ScHC		FC	AqHbt	L&W

Table 204.1 (continued) Designated Uses for Navajo Nation Surface Waters

Surface Water Body	Basin	Cataloging Unit	Domestic Water Supply (Dom)	Primary Human Contact (PrHC)	Secondary Human Contact (ScHC)	Agricultural Water Supply (AgWS)	Fish Consumption (FC)	Aquatic Habitat (AqHbt)	Livestock and Wildlife Watering (L&W)
Little Colorado River, origin of perennial flow to Navajo Nation boundary	Little Colorado	Lower Little Colorado	Dom	PrHC	ScHC			AqHbt	L&W
Lee Canyon, mouth to headwaters	Little Colorado	Lower Little Colorado			ScHC			AqHbt	L&W
Moenkopi Wash, mouth to headwaters	Little Colorado	Moenkopi Wash			ScHC	AgWS		AqHbt	L&W
Hamblin Wash, mouth to headwaters	Little Colorado	Moenkopi Wash			ScHC			AqHbt	L&W
Begashibito Wash, mouth to headwaters	Little Colorado	Moenkopi Wash			ScHC			AqHbt	L&W
Shonto Wash, mouth to headwaters	Little Colorado	Moenkopi Wash			ScHC			AqHbt	L&W
Cow Springs Lake	Little Colorado	Moenkopi Wash		PrHC	ScHC		FC	AqHbt	L&W
White Mesa Lake	Little Colorado	Moenkopi Wash		PrHC	ScHC		FC	AqHbt	L&W
Tappan Wash, mouth to headwaters	Little Colorado	Lower Little Colorado			ScHC			AqHbt	L&W
Cedar Wash, mouth to headwaters	Little Colorado	Lower Little Colorado			ScHC			AqHbt	L&W
Deadman Wash, mouth to headwaters	Little Colorado	Lower Little Colorado			ScHC			AqHbt	L&W
Canyon Diablo, mouth to Navajo Nation boundary	Little Colorado	Canyon Diablo			ScHC			AqHbt	L&W
San Francisco Wash, mouth to Navajo Nation boundary	Little Colorado	Lower Little Colorado			ScHC			AqHbt	L&W
Padre Canyon, mouth to Navajo Nation boundary	Little Colorado	Lower Little Colorado			ScHC			AqHbt	L&W

Table 204.1 (continued) Designated Uses for Navajo Nation Surface Waters

Surface Water Body	Basin	Cataloging Unit	Domestic Water Supply (Dom)	Primary Human Contact (PrHC)	Secondary Human Contact (ScHC)	Agricultural Water Supply (AgWS)	Fish Consumption (FC)	Aquatic Habitat (AqHbt)	Livestock and Wildlife Watering (L&W)
Youngs Canyon, mouth to Navajo Nation boundary	Little Colorado	Lower Little Colorado			ScHC			AqHbt	L&W
Yellow Jacket Canyon, mouth to Navajo Nation boundary	Little Colorado	Lower Little Colorado			ScHC			AqHbt	L&W
Dinnebito Wash, within Navajo Nation boundary	Little Colorado	Dinnebito Wash			ScHC			AqHbt	L&W
East Fork Dinnebito Wash	Little Colorado	Dinnebito Wash			ScHC			AqHbt	L&W
Corn Creek Wash, within Navajo Nation boundary	Little Colorado	Corn-Oraibi			ScHC			AqHbt	L&W
Oraibi Wash, within Navajo Nation boundary	Little Colorado	Corn-Oraibi			ScHC			AqHbt	L&W
Polacca Wash, within Navajo Nation boundary	Little Colorado	Polacca Wash			ScHC			AqHbt	L&W
Jeddito Wash, within Navajo Nation boundary	Little Colorado	Jeddito Wash			ScHC			AqHbt	L&W
Cottonwood Wash, within Navajo Nation boundary	Little Colorado	Cottonwood Wash			ScHC			AqHbt	L&W
Kinlichee Creek	Little Colorado	Cottonwood Wash		PrHC	ScHC	AgWS		AqHbt	L&W
Ganado Lake	Little Colorado	Cottonwood Wash		PrHC	ScHC		FC	AqHbt	L&W
Pueblo Colorado Wash	Little Colorado	Cottonwood Wash		PrHC	ScHC			AqHbt	L&W
Leroux Wash, within Navajo Nation boundary	Little Colorado	Leroux Wash			ScHC			AqHbt	L&W
Antelope Lake	Little Colorado	Leroux Wash		PrHC	ScHC		FC	AqHbt	L&W
Puerco River, within Navajo Nation boundary	Little Colorado	Upper Puerco & Lower Puerco	Dom		ScHC			AqHbt	L&W
Black Creek, mouth to headwaters	Little Colorado	Upper Puerco		PrHC	ScHC			AqHbt	L&W

Table 204.1 (continued) Designated Uses for Navajo Nation Surface Waters

Surface Water Body	Basin	Cataloging Unit	Domestic Water Supply (Dom)	Primary Human Contact (PrHC)	Secondary Human Contact (ScHC)	Agricultural Water Supply (AgWS)	Fish Consumption (FC)	Aquatic Habitat (AqHbt)	Livestock and Wildlife Watering (L&W)
Tohdildonih Wash, mouth to Asaayi Lake	Little Colorado	Upper Puerco			ScHC	AgWS		AqHbt	L&W
Asaayi Lake	Little Colorado	Upper Puerco		PrHC	ScHC	AgWS	FC	AqHbt	L&W
Asaayi (Bowl) Creek, Asaayi Lake to headwaters	Little Colorado	Upper Puerco		PrHC	ScHC	AgWS	FC	AqHbt	L&W
Asaayi (Bowl) Creek - East Fork	Little Colorado	Upper Puerco		PrHC	ScHC	AgWS		AqHbt	L&W
Bonito Creek	Little Colorado	Upper Puerco		PrHC	ScHC			AqHbt	L&W
Red Lake	Little Colorado	Upper Puerco		PrHC	ScHC		FC	AqHbt	L&W
Trout Lake	Little Colorado	Upper Puerco		PrHC	ScHC		FC	AqHbt	L&W
Rio Pescado, within Navajo Nation boundary	Little Colorado	Zuni River		PrHC	ScHC	AgWS		AqHbt	L&W
Zuni River tributaries within Navajo Nation boundary	Little Colorado	Zuni River			ScHC			AqHbt	L&W
Arroyo Chico and tributaries within Navajo Nation boundary	Rio Grande	Arroyo Chico			ScHC			AqHbt	L&W
Torreon Wash within Navajo Nation boundary	Rio Grande	Arroyo Chico			ScHC			AqHbt	L&W
Unnamed ephemeral tributaries and playas within Navajo Nation boundary	Rio Grande	North Plains			ScHC			AqHbt	L&W
Rio Puerco and tributaries within Navajo Nation boundary	Rio Grande	Rio Puerco			ScHC			AqHbt	L&W
Rio Salado and tributaries within Navajo Nation boundary	Rio Grande	Rio Salado			ScHC			AqHbt	L&W
Alamo Creek within Navajo Nation boundary	Rio Grande	Rio Salado		PrHC	ScHC			AqHbt	L&W
Rio San Jose tributaries within Navajo Nation boundary	Rio Grande	Rio San Jose			ScHC			AqHbt	L&W

Table 204.1 (continued) Designated Uses for Navajo Nation Surface Waters

Surface Water Body	Basin	Cataloging Unit	Domestic Water Supply (Dom)	Primary Human Contact (PrHC)	Secondary Human Contact (ScHC)	Agricultural Water Supply (AgWS)	Fish Consumption (FC)	Aquatic Habitat (AqHbt)	Livestock and Wildlife Watering (L&W)
Bluewater Creek within Navajo Nation boundary	Rio Grande	Rio San Jose		PrHC	ScHC		FC	AqHbt	L&W
San Juan River and perennial tributaries (except as listed below)	San Juan	*Numerous*	Dom	PrHC	ScHC	AgWS	FC	AqHbt	L&W
Nonperennial tributaries to the San Juan River (except as listed below)	San Juan	*Numerous*			ScHC			AqHbt	L&W
Desert Creek	San Juan	Lower San Juan Four Corners			ScHC			AqHbt	L&W
Gothic Creek	San Juan	Lower San Juan Four Corners			ScHC			AqHbt	L&W
McCraken Canyon within Navajo Nation boundary	San Juan	Lower San Juan Four Corners			ScHC			AqHbt	L&W
Teec Nos Pos Wash (perrenial)	San Juan	Lower San Juan Four Corners		PrHC	ScHC	AgWS	FC	AqHbt	L&W
Teec Nos Pos Wash (non perrenial)	San Juan	Lower San Juan Four Corners			ScHC			AqHbt	L&W
Toh Dahstini Wash	San Juan	Lower San Juan Four Corners			ScHC	AgWS		AqHbt	L&W
Gypsum Creek, mouth to headwaters	San Juan	Lower San Juan River			ScHC			AqHbt	L&W
Nokai Canyon, shore of Lake Powell at elevation 3720 feet to headwaters	San Juan	Lower San Juan River			ScHC			AqHbt	L&W
Oijeto Wash, mouth to headwaters	San Juan	Lower San Juan River			ScHC			AqHbt	L&W
Baker Arroyo	San Juan	Middle San Juan River			ScHC	AgWS		AqHbt	L&W
Cove Wash	San Juan	Middle San Juan River			ScHC			AqHbt	L&W
Eagle Nest Arroyo	San Juan	Middle San Juan River			ScHC			AqHbt	L&W
Pine Wash	San Juan	Middle San Juan River			ScHC			AqHbt	L&W

Table 204.1 (continued) Designated Uses for Navajo Nation Surface Waters

Surface Water Body	Basin	Cataloging Unit	Domestic Water Supply (Dom)	Primary Human Contact (PrHC)	Secondary Human Contact (ScHC)	Agricultural Water Supply (AgWS)	Fish Consumption (FC)	Aquatic Habitat (AqHbt)	Livestock and Wildlife Watering (L&W)
Ojo Amarillo	San Juan	Middle San Juan River		PrHC	ScHC			AqHbt	L&W
Salt Creek Wash	San Juan	Middle San Juan River			ScHC			AqHbt	L&W
Standing Redrock Wash	San Juan	Middle San Juan River			ScHC			AqHbt	L&W
Red Wash	San Juan	Middle San Juan River			ScHC			AqHbt	L&W
Gallegos Canyon	San Juan	Upper San Juan River		PrHC	ScHC			AqHbt	L&W
Blanco Canyon	San Juan	Blanco Canyon			ScHC			AqHbt	L&W
Largo Canyon	San Juan	Blanco Canyon			ScHC			AqHbt	L&W
Cutter Dam Reservoir	San Juan	Blanco Canyon		PrHC	ScHC		FC	AqHbt	L&W
Chaco River/Chaco Wash, mouth to mouth of Dead Man's Wash	San Juan	Chaco		PrHC	ScHC			AqHbt	L&W
Chaco River/Chaco Wash, mouth of Dead Man's Wash to Navajo Nation boundary	San Juan	Chaco			ScHC			AqHbt	L&W
Dead Man's Wash, mouth to headwaters	San Juan	Chaco			ScHC			AqHbt	L&W

Table 204.1 (continued) Designated Uses for Navajo Nation Surface Waters

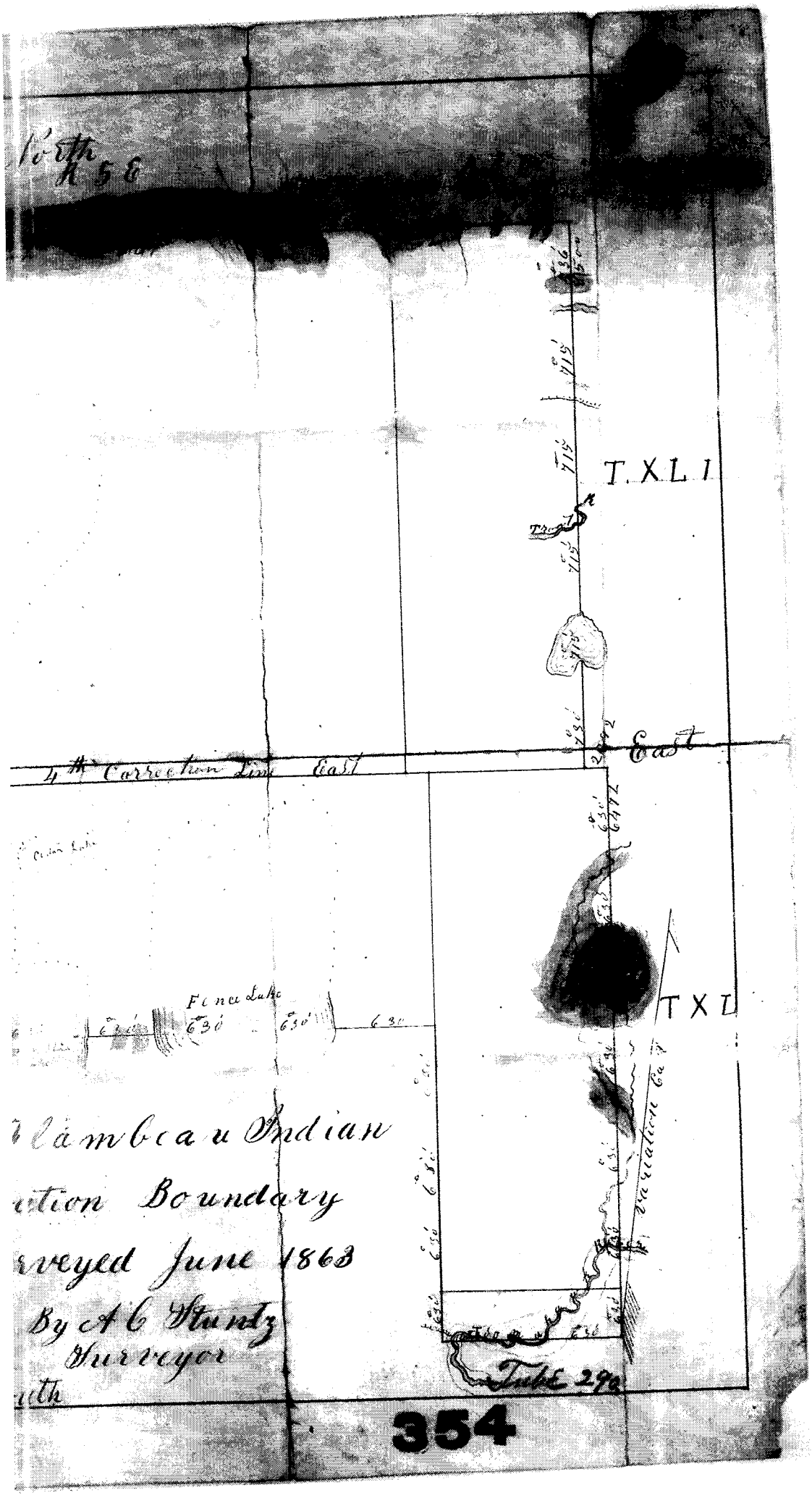
Surface Water Body	Basin	Cataloging Unit	Domestic Water Supply (Dom)	Primary Human Contact (PrHC)	Secondary Human Contact (ScHC)	Agricultural Water Supply (AgWS)	Fish Consumption (FC)	Aquatic Habitat (AqHbt)	Livestock and Wildlife Watering (L&W)
Chinde Wash, mouth to headwaters	San Juan	Chaco			ScHC			AqHbt	L&W
Cottonwood Arroyo, mouth to headwaters	San Juan	Chaco			ScHC			AqHbt	L&W
Sanostee Wash (perennial reaches)	San Juan	Chaco		PrHC	ScHC	AgWS		AqHbt	L&W
Sanostee Wash (non perennial reaches)	San Juan	Chaco			ScHC			AqHbt	L&W
Tocito Wash, mouth to headwaters	San Juan	Chaco			ScHC			AqHbt	L&W
Brimhall Wash, mouth to Navajo Nation boundary	San Juan	Chaco			ScHC			AqHbt	L&W
Captain Tom Wash (perennial reaches)	San Juan	Chaco		PrHC	ScHC	AgWS		AqHbt	L&W
Captain Tom Wash (non perennial reaches)	San Juan	Chaco			ScHC			AqHbt	L&W
Hunter Wash, mouth to Navajo Nation boundary	San Juan	Chaco			ScHC			AqHbt	L&W
Sheep Springs Wash, mouth to headwaters	San Juan	Chaco			ScHC			AqHbt	L&W
Coyote Wash, mouth to headwaters	San Juan	Chaco			ScHC			AqHbt	L&W
Indian Creek, within Navajo Nation boundary	San Juan	Chaco			ScHC			AqHbt	L&W

Table 204.1 (continued) Designated Uses for Navajo Nation Surface Waters

Surface Water Body	Basin	Cataloging Unit	Domestic Water Supply (Dom)	Primary Human Contact (PrHC)	Secondary Human Contact (ScHC)	Agricultural Water Supply (AgWS)	Fish Consumption (FC)	Aquatic Habitat (AqHbt)	Livestock and Wildlife Watering (L&W)
De Na Zin Wash, mouth to Navajo Nation boundary	San Juan	Chaco			ScHC			AqHbt	L&W
Berland Lake	San Juan	Chaco		PrHC	ScHC		FC	AqHbt	L&W
Chuska Lake	San Juan	Chaco		PrHC	ScHC		FC	AqHbt	L&W
Morgan Lake	San Juan	Chaco		PrHC	ScHC		FC	AqHbt	L&W
Whiskey Lake	San Juan	Chaco		PrHC	ScHC		FC	AqHbt	L&W
Chinle Creek/Chinle Wash, mouth to mouth of Canyon de Chelly	San Juan	Chinle		PrHC	ScHC	AgWS		AqHbt	L&W
Many Farms Lake	San Juan	Chinle		PrHC	ScHC	AgWS	FC	AqHbt	L&W
Walker Creek, perennial reaches, mouth to headwaters	San Juan	Chinle		PrHC	ScHC	AgWS		AqHbt	L&W
Walker Creek, nonperennial reaches, mouth to headwaters	San Juan	Chinle			ScHC			AqHbt	L&W
Laguna Creek, perennial reaches, mouth to headwaters	San Juan	Chinle		PrHC	ScHC	AgWS		AqHbt	L&W
Laguna Creek, nonperennial reaches, mouth to headwaters	San Juan	Chinle			ScHC			AqHbt	L&W
Tyende Creek, mouth to headwaters	San Juan	Chinle			ScHC			AqHbt	L&W
Lukachukai Wash, perennial reaches, mouth to headwaters	San Juan	Chinle	Dom	PrHC	ScHC	AgWS		AqHbt	L&W
Lukachukai Wash, nonperennial reaches, mouth to headwaters	San Juan	Chinle			ScHC			AqHbt	L&W
Black Mountain Wash, mouth to headwaters	San Juan	Chinle			ScHC			AqHbt	L&W
Nazlini Wash, perennial reaches, mouth to headwaters	San Juan	Chinle			ScHC	AgWS		AqHbt	L&W
Nazlini Wash, nonperennial reaches, mouth to headwaters	San Juan	Chinle			ScHC			AqHbt	L&W

Table 204.1 (continued) Designated Uses for Navajo Nation Surface Waters

Surface Water Body	Basin	Cataloging Unit	Domestic Water Supply (Dom)	Primary Human Contact (PrHC)	Secondary Human Contact (ScHC)	Agricultural Water Supply (AgWS)	Fish Consumption (FC)	Aquatic Habitat (AqHbt)	Livestock and Wildlife Watering (L&W)
Cottonwood Wash, mouth to headwaters	San Juan	Chinle			ScHC			AqHbt	L&W
Balakai wash, mouth to headwaters	San Juan	Chinle			ScHC			AqHbt	L&W
Canyon de Chelly Wash, mouth to mouth of Coyote Wash	San Juan	Chinle		PrHC	ScHC			AqHbt	L&W
Whiskey Creek, mouth of Coyote Wash to headwaters	San Juan	Chinle		PrHC	ScHC	AgWS	FC	AqHbt	L&W
Wheatfields Lake	San Juan	Chinle		PrHC	ScHC	AgWS	FC	AqHbt	L&W
Coyote Wash, mouth to headwaters	San Juan	Chinle			ScHC			AqHbt	L&W
Canyon del Muerto Wash, mouth of Canyon de Chelly to Tsaile Lake	San Juan	Chinle		PrHC	ScHC	AgWS		AqHbt	L&W
Tsaile Lake	San Juan	Chinle		PrHC	ScHC		FC	AqHbt	L&W
Tsaile Creek, lake to headwaters	San Juan	Chinle		PrHC	ScHC	AgWS	FC	AqHbt	L&W
Crystal Creek	San Juan	Chinle		PrHC	ScHC	AgWS		AqHbt	L&W
Little Whiskey Creek	San Juan	Chinle		PrHC	ScHC			AqHbt	L&W
Palisade Creek	San Juan	Chinle		PrHC	ScHC			AqHbt	L&W
Tohtso Creek	San Juan	Chinle		PrHC	ScHC	AgWS		AqHbt	L&W
Wheatfields Creek	San Juan	Chinle		PrHC	ScHC	AgWS	FC	AqHbt	L&W
Aspen Lake	San Juan	Chinle		PrHC	ScHC		FC	AqHbt	L&W
Round Rock Lake	San Juan	Chinle		PrHC	ScHC		FC	AqHbt	L&W
McElmo Creek	San Juan	McElmo Creek		PrHC	ScHC	AgWS		AqHbt	L&W
Montezuma Creek	San Juan	Montezuma Creek			ScHC			AqHbt	L&W
Mancos River	San Juan	Mancos River			ScHC			AqHbt	L&W



lambeau Indian

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By A G Wurtz

Surveyor

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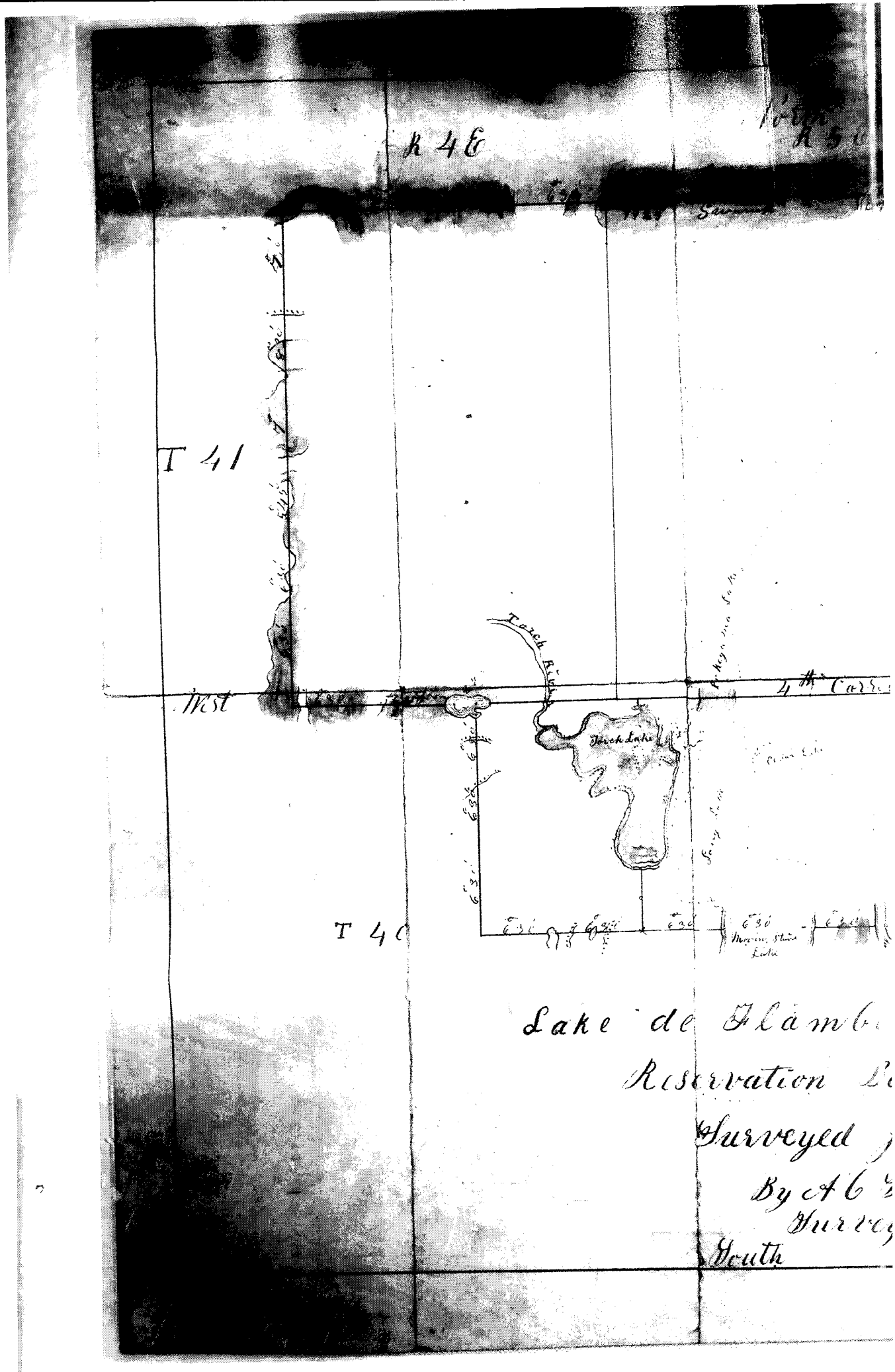
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Attachment BA

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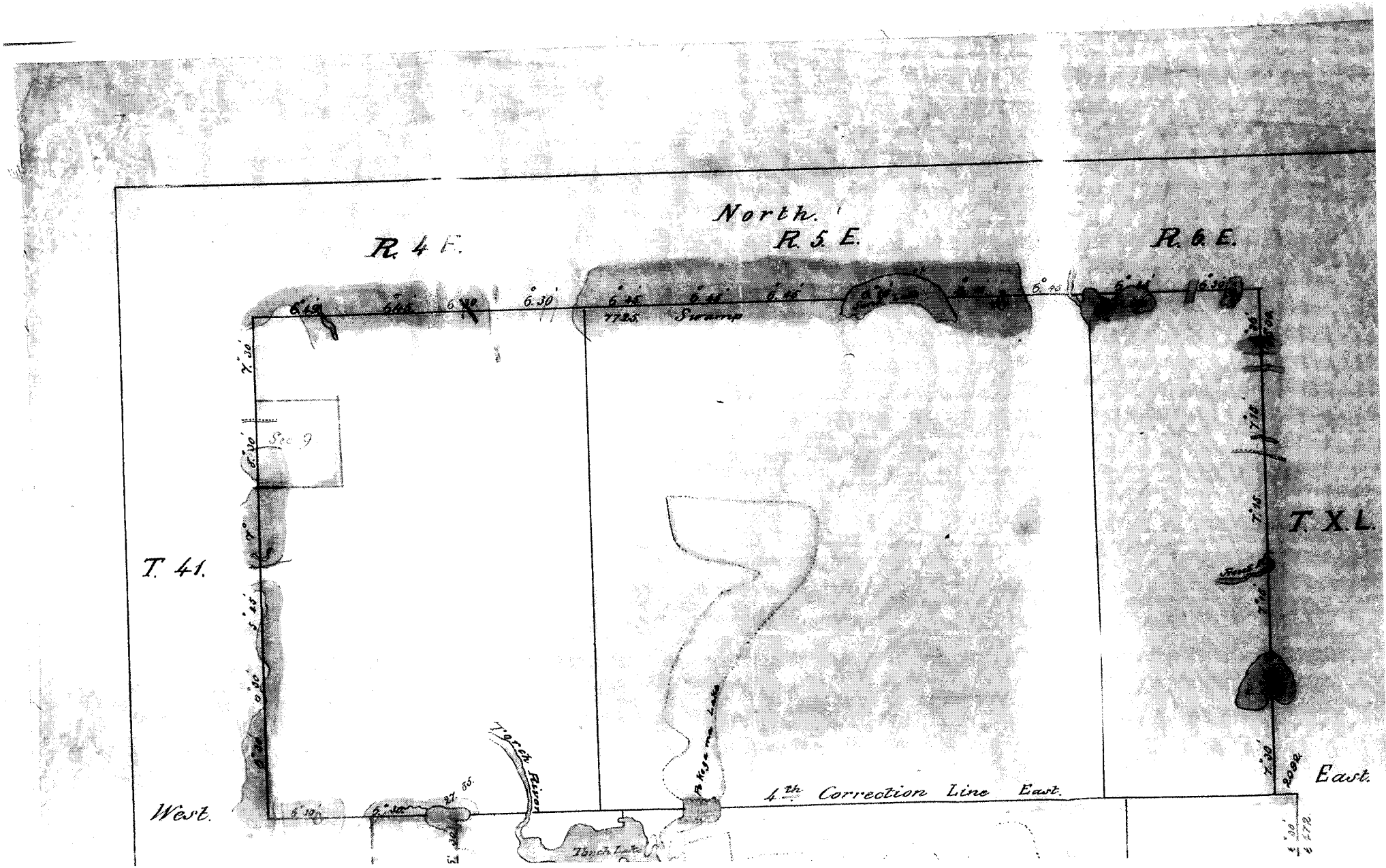
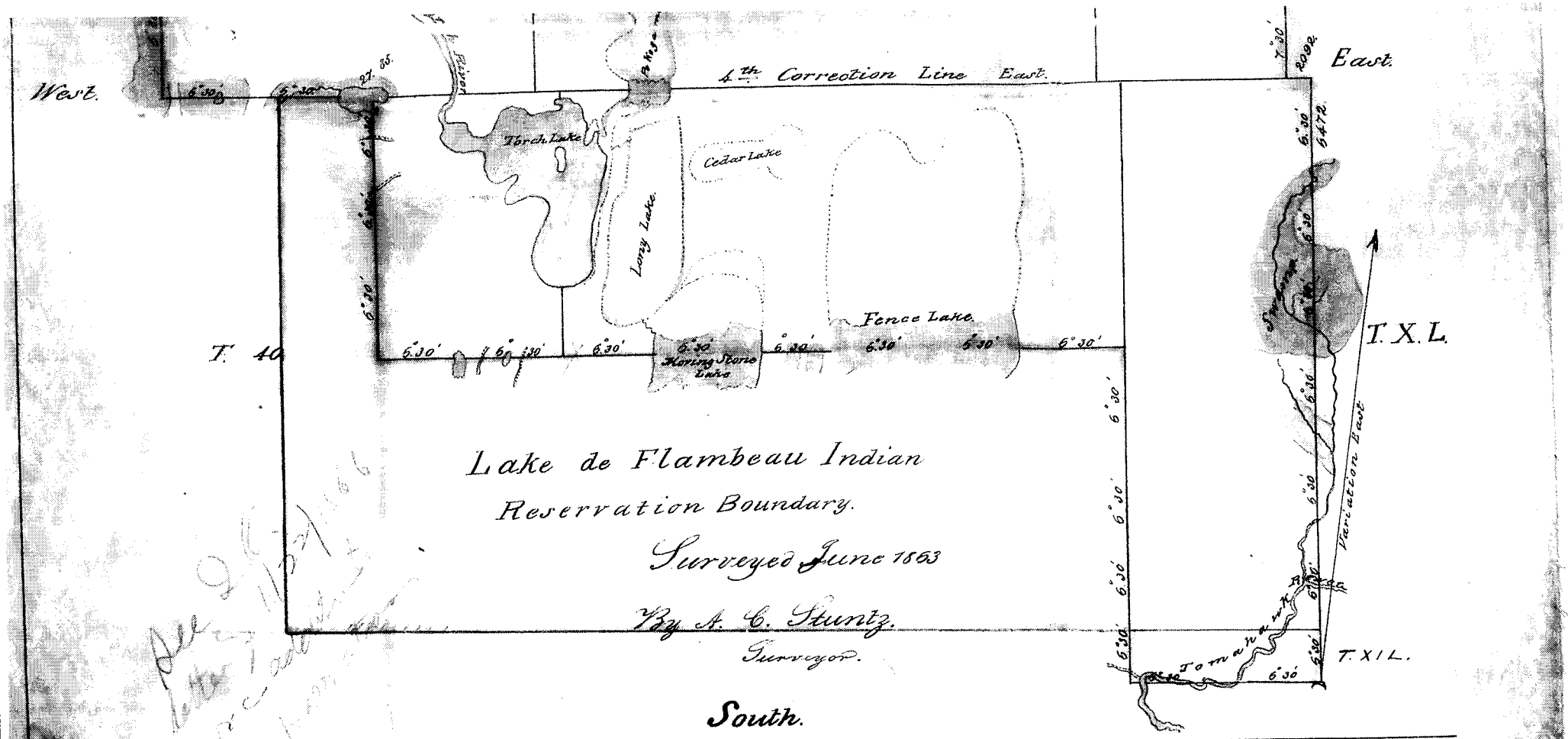
Survey Map of the Lac du Flambeau Band of Lake Superior Chippewa Indians' Reservation (1866), reproduced from the National Archives Records Administration, Cartographic Division, Record Group No. 75 (Records of the Bureau of Indian Affairs, Central Map Files, Wisconsin), Map No. 353


North.
R. 4 E.
R. 5 E.
R. 6 E.
T. 41.
T. X. L.
Sec 9
Swamp
7725
Tyrrich River
Tyrrich Lake
4th Correction Line East.
West.
East.



Note for authority for addition to reserve as surveyed by Stuntz- shown by red lines, see Dept letter of June 28. 1866. (I. 423.)
Sec 9. T. 41. R. 4. was omitted in secretarys order of C. to O. June 26. 1866

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